Supreme Court, U.S.
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No.

In the Supreme Court of the United States

THE KROGER CO.,

Petitioner,

v.

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether Section 515 of ERISA requires a court, in an action by a pension or welfare benefit fund to recover allegedly delinquent contributions required by a collective bargaining agreement ("CBA"), to disregard all extrinsic evidence of the meaning of the CBA, when the effect of disregarding the extrinsic evidence is to lead the court to determine that the CBA "unambiguously" forecloses an interpretation that was known to and acquiesced in by the fund and the union, as well as the employer, for 14 years and was upheld in a grievance proceeding between the employer and the union.

RULE 14.1(b) AND 29.6 STATEMENT

The following are the parties to the proceeding in the Court of Appeals for the Seventh Circuit:

1. The Kroger Co., defendant-appellant;
2. Central States, Southeast and Southwest Areas Pension Fund, plaintiff-appellee; and
3. Howard McDougall, trustee of Central States, Southeast and Southwest Areas Pension Fund, plaintiff-appellee.

The Kroger Co. has no parent corporation or non-wholly-owned subsidiaries, and no publicly held company owns 10% or more of the stock of The Kroger Co.

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PETITION FOR A WRIT OF CERTIORARI

The Kroger Co. respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals affirming the judgment in favor of plaintiffs (App., *infra*, 1a-19a) is reported at 226 F.3d 903. The orders of the court of appeals correcting a scrivener's error in its opinion (App., *infra*, 20a), and denying rehearing and rehearing en banc (App., *infra*, 21a) are unreported. The district court's opinions on remand denying petitioner's and respondent's motions for summary judgment (App., *infra*, 27a-41a) and adjudging petitioner liable (App., *infra*, 22a-26a) are unreported. The prior opinion of the court of appeals, reversing the entry of summary judgment in favor of petitioner (App., *infra*, 42a-52a), is reported at 73 F.3d 727. The prior opinion of the district court granting summary judgment to petitioner (App., *infra*, 53a-66a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 15, 2000. App., *infra*, 1a. A petition for rehearing and rehearing en banc was denied on November 16, 2000. App., *infra*, 21a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 515 of ERISA, 29 U.S.C. § 1145, provides:

> Every employer who is obligated to make contributions to a multiemployer plan under the terms of the plan or under the terms of a collectively bargained agreement shall, to the extent not inconsistent with law, make such contributions in accordance with the terms and conditions of such plan or such agreement.

STATEMENT

ERISA § 515 was added in 1980 to create a cause of action in favor of pension and welfare funds seeking to recover unpaid contributions due under a collective bargaining agreement ("CBA"). See *Laborers Health & Welfare Trust Fund* v. *Advanced Lightweight Concrete Co.*, 484 U.S. 539, 545-547 (1988). In its 20-year history, the courts of appeals have uniformly held that Section 515 allows funds to enforce CBAs free of certain defenses that the employer might otherwise assert in an action brought by the union, including failure of consideration, prior breach by the union, and oral modifications by the union and the employer unknown to the fund.

The circuits have splintered, however, regarding the effect of ERISA on the permissible uses of extrinsic evidence in interpreting CBAs. See A.M. Sulentic, *Promises, Promises: Using the Parol Evidence Rule to Manage Extrinsic Evidence in ERISA Litigation*, 3 U. PA. J. LAB. & EMPLOYMENT L. 1, 59 (2000) (observing that "serious differences of approach between the circuits are evident in their approach to extrinsic evidence"). Manifesting that circuit split, the court below held that Section 515 entitled a fund to acquiesce for many years in a course of performance, but then to succeed years later in litigation to compel contributions on the theory that the CBA "unambiguously" foreclosed the very interpretation in which the fund had long acquiesced. The Third Circuit reached the opposite result on indistinguishable facts in *Teamsters Indus. Employees Welfare Fund* v. *Rolls-Royce Motor Cars, Inc.*, 989 F.2d 132 (3d Cir. 1993). This case presents the Court with an opportunity to resolve the conflict between the Seventh and Third Circuits and shed light on the broader and deeper differences in approach among the circuits.

A. Kroger's Pension Contributions Pursuant to Section 515

This case presents the recurring problem that arises in Section 515 actions when a pension fund, as third-party bene-

ficiary of a CBA, seeks to repudiate the longstanding interpretation of the CBA shared by the fund, the employer, and the union, and recover from an employer contributions that are supposedly due under the "plain meaning" of the CBA.

1. Petitioner operates a national chain of grocery stores that are supported by distribution centers located throughout the country. App., *infra*, 2a. Since at least 1971, most of petitioner's distribution center warehouse employees have been covered by CBAs negotiated on their behalf by the International Brotherhood of Teamsters ("Teamsters"). *Id.* at 2a-3a. The unified CBA for each distribution center consists of two parts. To streamline the bargaining process, petitioner and the International union negotiate a Master Agreement that applies to warehouse employees at multiple sites, and then petitioner negotiates certain supplemental provisions with the Teamsters local union at the particular distribution center that are memorialized in a Local Supplement. *Id.* at 3a, 54a. The Master Agreement portion of each CBA requires petitioner to make pension contributions to respondent, Central States, Southeast and Southwest Areas Pension Fund, on behalf of "regular" employees on the regular seniority list, *i.e.*, "probationary" employees who have completed their probationary period, but not on behalf of "casual" employees, who do not accrue seniority and do not receive pension benefits. *Id.* at 3a-4a. Only employees on the regular seniority list receive pension benefits. This treatment has been memorialized in the Master Agreements negotiated from 1979 forward (see *ibid.*), including the revised Master at issue in this case, which was executed in 1986, nearly 10 years after petitioner and the union first began to classify all Atlanta new hires as casuals. App., *infra*, 54a. The Master Agreement provides that no more than 10 percent of the workforce may be classified as casuals at any given time. *Ibid.*

In the Master Agreements entered into during the past 25 years, Kroger and the Teamsters have consistently distinguished among three types of warehouse employees: (1) "regular" employees who have bid for a position and are on the regular se-

niority list; (2) "probationary" employees who have been hired on a trial basis, and who will be added to the regular seniority list after 30 working days or 60 calendar days of employment; and (3) "casual" employees who are "hired on a short-term basis" and "employed from time to time," and are not included on the regular seniority list. App., *infra*, 3a.

Beginning in 1977, petitioner and the Teamsters, with full disclosure to respondent, began designating all newly hired Atlanta warehouse employees as casuals, rather than as probationary employees. App., *infra*, 3a, 6a. The Teamsters' negotiating strategy was to secure premium pension benefits for regular employees on the regular seniority list, but, through Local Supplement language, to forgo pension benefits for newly hired casual employees until they became regular employees — a longer period of time than the probationary trial period otherwise provided under the Master Agreement. See Petitioner's Supplemental Appendix in the Court of Appeals ("C.A. Supp. App.") at 68, 70, 74-77, 82-83.

Accordingly, in conjunction with the 1986 Master Agreement, as in prior negotiations since 1977, Kroger negotiated a Local Supplement covering the warehouse employees at its Atlanta, Georgia, facility. App., *infra*, 54a. The Local Supplement became a source of some "confusion" to the district court because it used different terminology to describe the workers. *Id.* at 57a. The Master Agreement classifies employees as "regular," "probationary," or "casual," but the Local Supplement refers to "full-time" and "part-time" employees without defining either term, and does not use the term "casual." *Id.* at 56a-58a. The Local Supplement did not modify the provision in the Master Agreement that pension contributions would not be made for casual employees. However, in order to accomplish the parties' intent, the Local Supplement provided that part-time employees would become eligible for pension contributions only after they bid on a regular, *full-time* position, completed 30 days of *full-time* employment, and thus earned their place on the regular seniority list, thereby differentiating their track to regular employ-

ee status and placement on the regular seniority list from the trial period for newly hired probationary employees specified in Article 2, § 2.2, of the Master Agreement.

Consistent with the 1986 Master Agreement, petitioner made pension contributions to respondent for all regular employees on the regular seniority list, but not for casual employees. App., *infra*, 57a, 62a. New hires were informed that they would be classified as casuals and that they would neither accrue seniority nor receive pension benefits until they had successfully bid for a position and become "regular" employees. *Id.* at 6a-7a. The union agreed that new hires were to be classified as casuals, and respondent received documents from 1977 forward showing that contributions were not being made for the new hires until they became regular employees upon completion of their full-time employment probationary period. *Id.* at 6a, 17a; C.A. Supp. App. 190-196. Indeed, Central States received monthly reports identifying each employee's date of hire and the later date on which petitioner began making pension contributions for the employee. App., *infra*, 17a; see also C.A. Supp. App. 190-206.

2. Both the union and the fund decided in 1991 to challenge the practice in which they had acquiesced for 14 years. The union's challenge failed, but the fund's challenge – this lawsuit – will have succeeded unless this Court grants review.

Article 5 of the master portion of the CBA provides that any controversy regarding the seniority standing of employees (and thus their eligibility for pension contributions) must be resolved through the multi-step grievance procedure established in the CBA. In 1991, the union filed a grievance asserting that petitioner had breached its obligation to make pension contributions for the part-time warehouse employees who were not on the regular seniority list. Because the union's grievance was not resolved during the first two steps of the grievance process, it was submitted to the Step 3 Committee, which had authority to issue a final determination of the matter. After reviewing the CBA and examining evidence of the parties'

course of performance over the preceding 15 years, the Grievance Committee, consisting of one union representative designated by the International union and one representative of petitioner, denied the grievance, concluding that, under the parties' longstanding interpretation of the CBA, "part-time" employees who were not on the regular seniority list were not entitled to pension contributions. See App., *infra*, 33a, 37a n.3.

Contemporaneously, the fund audited the employment records for the Atlanta facility and confirmed that petitioner had not made contributions between December 1986 and December 1989 for warehouse employees designated as casuals. App., *infra*, 5a. The fund then brought suit under Section 515, alleging that the new hires in the Atlanta facility were not truly casuals but were probationary employees for whom petitioner was required to make contributions after the 30th day of employment.

B. Proceedings Below

After discovery, petitioner moved for summary judgment on the ground that the newly hired warehouse employees, until they successfully bid for a regular position, were properly classified as casual employees for whom no pension contributions were due. The district court granted the motion. App., *infra*, 53a-66a. Agreeing with respondent that Section 515 entitled the fund to enforce the CBA free of any special meanings attached to terms in the agreement that were not communicated to the fund, the court began its analysis by examining the language of the CBA. *Id.* at 61a n.5. The court observed that, when the Master Agreement and Local Supplement were read together, the undefined term "part-time" in the Local Supplement was ambiguous. *Id.* at 57a-58a. However, the district court resolved that the two portions of the CBA could be harmonized by equating the term "part-time" in the Local Supplement with the term "casual" in the Master Agreement. *Id.* at 60a. The court then held on the basis of the undisputed facts that "the employees designated as 'casuals' or 'part-timers' by the Atlanta Center were consistently handled as true 'casual' laborers within the meaning of the CBA." *Id.* at 62a. Hence, the court held

that, "[a]s far as the explicit text of the CBA is concerned, [petitioner] appears to have complied with its terms," *id.* at 64a, and that petitioner was therefore entitled to summary judgment.

The court of appeals reversed, holding that the lower court had erred by construing the two parts of the CBA separately. App., *infra*, 48a. In its view, the meaning of "part-time" in the Local Supplement was ambiguous when that supplement and the Master Agreement were read together, as the court held they should be. *Id.* at 48a-49a. According to the court, "part-time" could mean casual or it could mean regular employees who do not work a full week, in which case petitioner was required to make contributions to the fund. *Id.* at 50a-51a. The court remanded the case for resolution of this ambiguity, directing the lower court to determine what was "understood by the parties to the CBA." *Id.* at 52a.

On remand, following a bench trial, the district court granted judgment for respondent. App., *infra*, 22a-26a. Contrary to its earlier determination on summary judgment, the court now held that the warehouse employees in question did not meet the Master Agreement's definition of "casual" because they were not "hired on a short-term basis" nor were they "employed from time to time." *Id.* at 24a. Although 85 percent of the newly hired employees ultimately worked less than 12 weeks (see *id.* at 14a), the district court thought it dispositive that petitioner hired these employees with the "hope" that they would eventually become full-time regular employees. *Id.* at 7a.

The district court acknowledged several factors pointing in the other direction. The court found as fact that "the local union representatives and the [company] negotiators acquiesced in the treatment of all new hires as 'part-timers' not entitled to pension and welfare contributions from at least [1977] through the end of the audit period and beyond." App., *infra*, 25a. The court also acknowledged that the employees themselves understood that they were not eligible for pension contributions until they successfully bid for regular employment, *ibid.*, and that respondent itself had remained silent about the classification of the

warehouse employees over a "long period of time," *id.* at 24a. Nevertheless, the court held that the classification and treatment of the "part-time" warehouse employees as casuals under the *Local Supplement* reflected *a mere* "'*local*' understanding" that under Section 515 and Seventh Circuit case law could play no role in determining the meaning of the CBA. *Id.* at 26a.

The district court also acknowledged the Step 3 grievance proceeding that had been resolved in favor of petitioner. App., *infra*, 33a, 37a & n.3. But the court confined its consideration of that fact to whether the result was legally "binding" on the fund, and concluded that it was not. *Id.* at 37a n.3.

The court of appeals affirmed the judgment for the fund. App., *infra*, 1a-19a. Although the court recognized that extrinsic evidence may be introduced in Section-515 actions to establish the meaning of ***facially ambiguous*** terms in a CBA. (*id.* at 11a, citing *Rolls-Royce*, 989 F.2d 132), it did not adopt the Third Circuit's rule, announced in *Rolls-Royce*, allowing extrinsic evidence to ***establish*** that a CBA term is ambiguous. Citing its own decisions in *Central States, S.E. & S.W. Areas Pension Fund* v. *Gerber Truck Serv., Inc.*, 870 F.2d 1148 (7th Cir. 1989) (en banc), and *Central States, S.E. & S.W. Areas Pension Fund* v. *Joe McClelland, Inc.*, 23 F.3d 1256 (7th Cir. 1994), the court held that petitioner was bound by what the court took to be the CBA's definition of "casual employees" in the Master Agreement because that term was not obviously ambiguous. App., *infra*, at 13a. The court held that extrinsic evidence cannot be introduced to show that the parties to a CBA ascribed a different meaning to a term that, in the court's view, is unambiguously defined in the CBA. *Id.* at 16a.

In the portion of its analysis holding that it could not consider extrinsic evidence, the court took no account of petitioner's evidence that the fund ***knew of and acquiesced in*** petitioner's construction for 14 years. Instead, the court addressed that evidence only in a separate section of its opinion holding that the fund was not estopped from advancing its new construction. App., *infra*, 17a-18a. The Seventh Circuit's entire rationale for

allowing the fund to change its position was that "Kroger * * * knew of its practice of designating the employees in question as casuals and, therefore, it was in a better position than the fund to know the truth that its practice did not comport with the CBA." *Id.* at 18a. Thus, powerful extrinsic evidence suggesting that the true interpretation of the contract was petitioner's was rejected on the ground that the court had already ascertained "the truth" in the part of its opinion that disregarded extrinsic evidence. Likewise, the court did not even deem worthy of mention petitioner's other powerful piece of extrinsic evidence of the parties' intent: the fact that a grievance committee established under the CBA had considered and rejected the very argument that the court accepted as to the meaning of the CBA.

REASONS FOR GRANTING THE WRIT

This case presents the Court with an opportunity to provide much-needed guidance to the lower courts regarding the proper approach to interpreting the pension provisions of CBAs under Section 515. Specifically, the Court should clarify the circumstances in which extrinsic evidence of the parties' course of performance under a labor contract may be introduced to establish the meaning of terms in the contract. The Seventh Circuit held that evidence regarding the longstanding interpretation of the CBA by the parties and the pension fund should be disregarded unless the court first determines that the CBA is ambiguous on its face. The court applied that rule here, holding that respondent could assert a "plain meaning" interpretation of the CBA that was inconsistent with the interpretation shared by petitioner, the union, the employees, and respondent for 14 years. The court thus ignored what was clearly "understood by the parties to the CBA" and reached a result that conflicts with the contracting parties' understanding.

This ruling, which highlights the chaos in the lower courts over the integration of the federal common law of collective bargaining agreements with Section 515, is at odds with the decisions of other circuits and contrary to the purpose and the legislative history of Section 515. Further review is warranted.

I. THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH DECISIONS OF OTHER CIRCUITS AND REFLECTS BROADER CONFUSION AMONG THE CIRCUITS CONCERNING THE USE OF EXTRINSIC EVIDENCE IN INTERPRETING CBAs REQUIRING PENSION AND WELFARE FUND CONTRIBUTIONS

Since Congress amended ERISA to include Section 515, the courts have struggled with the question whether, and if so in what circumstances, extrinsic evidence may be used to interpret the provisions of a CBA requiring contributions to a pension or welfare fund. Numerous appellate and district court decisions have discussed the issue. Commentators also have disagreed about the proper role of extrinsic evidence in ERISA actions requiring the interpretation of CBAs that provide for pension and welfare benefit contributions by employers. Compare Sulentic, *supra*, 3 U. PA. J. LAB. & EMPLOYMENT L. at 62-63 (rejecting the suggestion that consideration of extrinsic evidence in Section 515 cases devalues the written CBA and opining that an agreement that is unambiguous and "accurate * * * has nothing to fear from parol evidence"), with G.P. Rogers, *Rethinking* Yard-Man: *A Return to Fundamental Contract Principles in Retiree Benefits Litigation*, 37 EMORY L.J. 1033, 1071-1072 (1988) (opining that, in ERISA litigation, "[e]xtrinsic evidence should only play a part where the court first determines that the contract is ambiguous").

Despite this active debate, there is no consensus among the circuits on whether, and how, extrinsic evidence may be used in Section 515 actions to interpret a CBA that requires pension or welfare fund contributions. As things now stand, therefore, two courts with different extrinsic evidence rules may render conflicting decisions about whether contributions are required under Section 515 for the same class of employees under the same multi-state CBA. Review by this Court is necessary to establish uniformity in the application of the extrinsic evidence rule to cases arising under this important, much-litigated statute.

A. The starkest conflict is between the decision below and *Rolls-Royce*, 989 F.2d at 135-136. In that case, the Third Circuit concluded that Section 515 permits the introduction of extrinsic evidence to show that an apparently unambiguous CBA term is in fact ambiguous. The court held that traditional tools of contract interpretation should be employed to the extent not inconsistent with federal labor law, and that the use of extrinsic evidence known to the fund in no way frustrated the purposes of Section 515. See *id.* at 135, 138.

The CBA in *Rolls-Royce* provided that the employer was required to make pension and welfare fund contributions for "each employee." 989 F.2d at 134. The employer and the union understood that language to require contributions only for regular employees who had completed a 60-day probationary period. *Id.* at 137. Hence, during the term of the CBA, the company made no contributions for probationary employees. *Id.* at 134. Although the funds knew that the company was not making contributions for probationary employees, they made no objection to this practice until, five years into the CBA, they filed a Section 515 lawsuit seeking delinquent contributions for the probationary employees. *Ibid.* The district court granted summary judgment for the funds, holding that the CBA provision requiring contributions for "each employee" unambiguously encompassed probationary employees and that the funds were entitled to enforce the language of the CBA despite their awareness of the contrary interpretation shared by the union and the employer. *Id.* at 132.

The Third Circuit reversed and remanded with directions to enter summary judgment for the employer, concluding that the lower court had erred by excluding extrinsic evidence designed to show that the term "each employee" was ambiguous. The court observed that, "[a]t first glance," the reference to "each employee" in the CBA appeared to be unambiguous. 989 F.2d at 135. But the court of appeals, unlike the Seventh Circuit in this case, did not confine its analysis of potentially ambiguous terms to the four corners of the CBA.

The court acknowledged the special status that Section 515 confers on pension and welfare funds. The statute allows them, as third-party beneficiaries, to enforce a CBA free of certain contract defenses that the parties themselves might have raised. For example, an employer cannot defeat a fund's claim for delinquent contributions by establishing that, unbeknownst to the fund, the union agreed to forgo certain contributions required by the CBA. 989 F.2d at 138.

Nevertheless, as the court explained, Section 515 does not allow funds to enforce an interpretation of the CBA that was never intended by the employer or the union. As the court explained, "[a]lthough a variety of contract defenses would not preclude the Funds from enforcing their right to collect payments pursuant to the collective bargaining agreement, the Funds are not entitled to enforce a nonexistent contractual obligation." 989 F.2d at 138. Thus, the threshold issue in a Section 515 case is whether the employer agreed in the CBA to make the contributions sought by the fund.

In deciphering the intended meaning of "each employee" in the CBA, the Third Circuit agreed with this Court that "the practical interpretation of a contract by the parties to it for any considerable period of time before it comes to be the subject of controversy is deemed of great, if not controlling, influence." 989 F.2d at 137 (quoting *Old Colony Trust Co.* v. *City of Omaha*, 230 U.S. 100, 118 (1913)). During the five years since the first CBA was executed, neither the union nor the funds had demanded that the company begin making contributions for probationary employees, although both were aware that such contributions were not being made. 989 F.2d at 137. The unanimous acquiescence of employer, union, and fund in the idiosyncratic meaning of "each employee" was considered such strong extrinsic evidence that the Third Circuit did not even deem further proceedings necessary on remand; rather, it remanded with instructions to enter judgment for the employer. *Id.* at 134.

The conflict between the decision below and *Rolls Royce* is inescapable. Indeed, this is a far stronger case for the

employer than was *Rolls Royce*: the contract term on which this case turns is far less clear on its face than was the one on which *Rolls Royce* turned, and the extrinsic evidence in this case is of the same character as — but even stronger than — the evidence deemed dispositive in *Rolls Royce*.

The key phrase in *Rolls Royce* was "each employee," a term that admits of little ambiguity in the absence of extrinsic evidence. Here, by contrast, the term the court of appeals ultimately found unambiguous was "casual employees." Far from being self-defining in the context of the CBAs at issue, that term repeatedly confounded the courts below. The district court first granted summary judgment for petitioner, but the court of appeals then reversed on the ground that this case turns on the meaning of the ambiguous term "part-time" in the Local Supplement. Then the district court decided that the case turned after all on the meaning of the term "casual," and the court of appeals agreed and declared — after years of litigation — that the term is unambiguous.

The extrinsic evidence in *Rolls Royce* was five years of unanimous acquiescence by the fund, the union, and the employer in the practice of not making contributions for probationary employees. Here, there is a much longer — 14-year — history of such three-way acquiescence in not making contributions for newly hired warehouse employees designated as casuals, and the record shows that the union bargained away contributions for such employees in exchange for top-dollar contributions for regular employees. C.A. Supp. App. 68, 70, 74-77, 82-83. Moreover, in this case, there is another very important piece of extrinsic evidence not present in *Rolls Royce*: the very mechanism established by the CBA to resolve disputes of this sort as between the union and the employer was invoked, and it resulted in a decision affirming the employer's position that contributions were not required for the newly hired warehouse employees. This "Step 3" grievance proceeding result was not binding on the fund, but it was surely the most powerful extrinsic evidence that the "unambiguous" meaning

found by the court below was not in fact the correct meaning of the CBA.[1] All of this evidence would have been given great weight in the Third Circuit, but was ignored in the Seventh.

The difference in approach between the Third and Seventh Circuits in Section 515 cases is not confined to these two conflicting decisions, but is firmly entrenched. The Third Circuit has repeatedly reaffirmed its rule allowing extrinsic evidence in ERISA actions to demonstrate that a CBA term is ambiguous.[2]

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[1] Indeed, in contrast to the shaky foundation in labor policy of the Seventh Circuit's rule disregarding extrinsic evidence, there is a strong federal labor policy favoring the use of arbitration to resolve disputes that arise out of CBAs. See *Local 174, Teamsters, Chauffeurs, Warehousemen & Helpers of Am.* v. *Lucas Flour Co.*, 369 U.S. 95, 105 (1962) (acknowledging the "basic policy of national labor legislation to promote the arbitral process as a substitute for economic warfare"); *United Steelworkers of Am.* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578 (1960) (holding that the "hostility evinced by courts toward arbitration of commercial agreements has no place" in the context of labor disputes subject to an arbitration provision in the CBA). It is particularly unwarranted to substitute a court's conclusion that a CBA is "unambiguous," and therefore must be construed without regard to extrinsic evidence, for the contrary conclusion reached via the dispute resolution mechanism specified in the CBA. As the Court recognized in *Steelworkers*, even the most comprehensive CBAs contain gaps that must be "filled in by reference to the practices of the particular industry and of the various shops covered by the agreement." *Id.* at 580. Arbitration is the preferred means of filling in such gaps. "The processing of disputes through the [arbitration] machinery is actually a vehicle by which meaning and content are given to the collective bargaining agreement." *Id.* at 582 (observing that even the "ablest judge cannot be expected to bring the same experience and competence to bear upon the determination of a grievance" under the CBA).

[2] See *International Union, United Auto., Aerospace & Agric. Implement Workers of Am., U.A.W.* v. *Skinner Engine Co.*, 188 F.3d 130, 145 (3d Cir. 1999) ("this court has instructed that extrinsic evidence may be used to determine whether a contract is ambiguous") (citing *Rolls-Royce*); *American Flint Glass Workers Union, AFL-CIO* v. *Beaumont Glass Co.*, 62 F.3d 574, 581 (3d Cir. 1995) (to determine whether a CBA is ambiguous, the court must "hear[ ] the proffer of the parties and determine [ ] if there are objective indicia that, from the linguistic reference point of the parties, the terms of the contract are susceptible of different meanings") (quoting *Rolls-Royce*, 989 F.2d at 135).

Likewise, the decision below is part of a long line of Seventh Circuit decisions consistently disregarding extrinsic evidence in Section 515 cases, no matter how compelling the case for consideration of the evidence and over the objections of several judges of that court.[3] The conflict between the Third and Seventh Circuits will not go away unless this Court resolves it.

B. The Third Circuit is not the only court that disagrees with the Seventh Circuit. The Sixth Circuit, unlike the Seventh, will allow the employer in a Section 515 case to demonstrate that a CBA term has an idiosyncratic meaning using any extrinsic evidence that was known to the fund at the time the disputed contributions allegedly accrued. See *Brown-Graves Co.* v. *Central States, S.E. & S.W. Areas Pension Fund*, 206 F.3d 680, 684 (6th Cir. 2000); *Central States, S.E. & S.W. Areas Pension Fund* v. *Behnke, Inc.*, 883 F.2d 454, 463 (6th Cir. 1989).

The Sixth Circuit concurs with the Seventh Circuit's analogy comparing pension funds to holders in due course in commercial law, who are entitled to enforce contracts without regard to understandings and defenses applicable to the original parties. See *Bakery & Confectionery Union & Indus. Int'l Health Benefits & Pension Funds* v. *New Bakery Co.*, 133 F.3d 955, 959 (6th Cir. 1998) (citing *Gerber Truck*). But the Sixth

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[3] See, *e.g.*, *Central States, S.E. & S.W. Areas Pension Fund* v. *Central Cartage Co.*, 69 F.3d 1312, 1315 (7th Cir. 1995) (multi-employer pension agreements are not "normal two-party contract[s] for which evidence of idiosyncratic meaning may be used to depart from the objective meaning of the words"); *id.* at 1317 (Flaum, J., concurring in the judgment) ("[T]he majority apparently concludes that a more narrow principle of disallowing extrinsic evidence of ambiguity in pension and welfare benefits cases trumps [the 'external ambiguity' or 'idiosyncratic meaning' doctrine], choosing not to directly address the doctrinal tension. It is my view that such a fundamental principle of contract law deserves more scrutiny than this * * *."); *Joe McClelland, Inc.*, 23 F.3d at 1259 (7th Cir. 1994) ("extrinsic evidence may not be used to create an ambiguity in a pension or welfare agreement subject to ERISA"); *Bidlack* v. *Wheelabrator Corp.*, 993 F.2d 603, 619 (7th Cir. 1993) (en banc) (Easterbrook, Bauer, Coffey & Manion, JJ., dissenting); *Gerber Truck*, 870 F.2d 1148 (en banc).

Circuit's decisions have required that the fund actually satisfy the prerequisites for holder-in-due-course status. Under the Uniform Commercial Code, an entity cannot become a holder in due course if it receives notice of a claim or defense at the time it acquires a negotiable instrument. See U.C.C. § 3-302(1)(c). In the same vein, a pension fund with timely notice of the meaning attached to a CBA term by the parties should not be permitted to exclude evidence of that meaning by claiming holder-in-due-course status under Section 515. See *Brown-Graves Co.*, 206 F.3d at 684 (extrinsic evidence was properly excluded because the fund "had no notice of the unusual meaning [the employer] attached to the term 'casual employees'"). Thus, the Sixth Circuit would have analyzed this case quite differently than did the Seventh Circuit, and would almost certainly have reached a different outcome.

Despite the sound points made by the Third and Sixth Circuits, the Seventh Circuit is not alone in its extremely restrictive approach to extrinsic evidence. The Second, Eighth, Ninth, and Eleventh Circuits have ruled that extrinsic evidence is not admissible to establish the meaning of a CBA term unless the CBA is ambiguous on its face.[4] Those decisions contain little reasoning, and certainly no persuasive answer to the analyses of the Third and Sixth Circuits, but they reaffirm that the conflict this Court is being asked to resolve is one that will not dissipate without action by this Court.

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[4] See *Bozetarnik* v. *Mahland*, 195 F.3d 77, 83 (2d Cir. 1999); *American Fed'n of Grain Millers, AFL-CIO* v. *International Multifoods Corp.*, 116 F.3d 976, 981 (2d Cir. 1997); *Brown* v. *Health Care & Ret. Corp. of Am.*, 25 F.3d 90, 92-93 (2d Cir. 1994); *Stewart* v. *KHD Deutz of Am. Corp.*, 980 F.2d 698 (11th Cir. 1993); *Central States, S.E. & S.W. Areas Pension Fund* v. *Independent Fruit & Produce Co.*, 919 F.2d 1343, 1349 (8th Cir. 1990); *Howe* v. *Varity Corp.*, 896 F.2d 1107, 1110 (8th Cir. 1990), aff'd on other grounds, 516 U.S. 489 (1996); *Pierce County Hotel Employees & Rest. Employees Health Trust* v. *Elks Lodge, B.P.O.E. No. 1450*, 827 F.2d 1324, 1327 (9th Cir. 1987).

II. THE DECISION OF THE COURT OF APPEALS IS ERRONEOUS

The Seventh Circuit's extrinsic evidence rule, especially as applied in the decision below, frustrates the objectives of our national policy favoring stability and predictability in labor relations. As is evident from the outcome in this case, the Seventh Circuit's rule undermines the integrity of the collective bargaining process by burdening employers with pension obligations that were never contemplated by the employer, the union, the employees, or the multi-employer pension or welfare fund. The per se exclusion of extrinsic evidence finds no support in the text of Section 515 or its legislative history. Moreover, the Seventh Circuit's rule is inconsistent with basic principles of contract interpretation.

Section 515 does not by its terms define the appropriate uses of extrinsic evidence in determining an employer's obligation to make pension contributions under a CBA. Instead, the statute simply commands that employers that are obligated to make contributions under a pension plan or CBA shall "make such contributions in accordance with the terms and conditions of such plan or such agreement." 29 U.S.C. § 1145. Thus, Congress left it to the courts to develop rules for the interpretation of CBAs subject to Section 515 as part of the evolving body of "federal common law of rights and obligations under ERISA-regulated plans." *Firestone Tire & Rubber Co.* v. *Bruch*, 489 U.S. 101, 110 (1989).

Provisions of a statute must be construed so as to give effect to the "purposes Congress sought to serve." *Chapman* v. *Houston Welfare Rights Org.*, 441 U.S. 600, 608 (1979). But courts "must take care not to extend the scope of the statute beyond the point where Congress indicated it would stop." *62 Cases, More or Less, Each Containing Six Jars of Jam* v. *United States*, 340 U.S. 593, 600 (1951). The court below, in its zeal to advance the purposes of Section 515, adopted a per se rule requiring the exclusion of extrinsic evidence offered to show ambiguity in CBAs unless the court finds an ambiguity on the

face of the CBA. App., *infra*, 11a, 13a. As this case demonstrates, application of the lower court's rule leads to inequitable results, allowing a pension fund to enforce an interpretation of the CBA that is inconsistent with the longstanding interpretation shared by the parties and the fund. Because the exclusion of extrinsic evidence known to the fund is not necessary to effectuate the purposes of Section 515, the court below simply went too far with its extrinsic evidence rule.

Congress added Section 515 to "give employers a strong incentive to honor their contractual obligations to contribute [to pension funds] and to facilitate the collection of delinquent accounts." *Advanced Lightweight Concrete*, 484 U.S. at 547; accord 126 Cong. Rec. 20180, 23039 (1980) (statement of Rep. Thompson) ("The public policy of this legislation [is] * * * to discourage delinquencies and simplify delinquency collection."). When employers fail to make their promised contributions, pension funds lose the benefit of investment income that could have been earned on the past-due amounts, and they incur the cost of attempting to collect the delinquencies. See STAFF OF SENATE COMM. ON LABOR AND HUMAN RESOURCES, 96TH CONG., THE MULTIEMPLOYER PENSION PLAN AMENDMENTS ACT OF 1980: SUMMARY AND ANALYSIS OF CONSIDERATION 43 (Comm. Print 1980) (hereinafter "MPPAA Report"). If the delinquent contributions remain uncollected, the funds may be unable to provide the level of benefits that had been promised based on the funds' actuarial assumptions. *Ibid.*

The statute encourages employers to make all contributions provided for in a CBA by allowing funds that prevail in Section 515 actions to recover not only the delinquent contributions but also court costs, attorneys' fees, interest on the contributions owed, and liquidated damages. See 29 U.S.C. § 1132(g)(2). Congress intended Section 515 to be an expeditious remedy that could not be derailed by "defenses *unrelated to the employer's promise and the plans' entitlement* to the contributions." MPPAA Report, at 44 (emphasis added). Courts have uniform-

ly concluded that Section 515 bars employers from asserting against the fund the following types of defenses that would be effective against the union: fraud in the inducement by the union, oral side agreement with the union, breach by the union, failure of consideration, and failure of the union to have majority support.[5] By eliminating these defenses, Section 515 focuses the litigation on the ultimate issue whether the terms of the CBA require the employer to make the disputed contributions.

Section 515 was never intended, however, to foreclose an employer from demonstrating that the contributions demanded by a pension fund simply are not required by the CBA, as intended and interpreted by the employer, the union, and the fund. This is evident from the language of the statute and the legislative history. Congress spoke of ensuring that employers make contributions "in accordance with the terms and conditions" of the agreement, 29 U.S.C. § 1145, and it recounted the losses that funds and pensioners may suffer if employers "repudiate their pension promises." MPPAA Report, at 44. Because Section 515 does not require employers to make pension contributions for every employee, but only to make those contributions promised in the CBA, Congress necessarily understood that lawsuits under Section 515 would involve judicial interpretation of the pension provisions of CBAs,

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[5] See *Bakery & Confectionery Union & Indus. Int'l Pension Fund* v. *Ralph's Grocery Co.*, 118 F.3d 1018, 1021-1022 (4th Cir. 1997) (oral modification, union's fraud in the inducement, mistake of fact, and other defenses that could be asserted against the union); *Central Pa. Teamsters Pension Fund* v. *McCormick Dray Line, Inc.*, 85 F.3d 1098, 1103-1104 (3d Cir. 1996) (mutual mistake of the union and employer); *Independent Fruit*, 919 F.2d at 1349 (fraud in the inducement by the union, oral side agreement with the union, breach by the union, failure of consideration, and failure of the union to have majority support); *Behnke, Inc.*, 883 F.2d at 463 (same); *Gerber Truck*, 870 F.2d at 1154 (same); *Bituminous Coal Operators' Ass'n* v. *Connors*, 867 F.2d 625, 632-636 (D.C. Cir. 1989) (mutual mistake of union and employer); *Elks Lodge, B.P.O.E. No. 1450*, 827 F.2d at 1327 (oral modification with the union); *Trustees of Laborers Local Union 800 Health & Welfare Trust Fund* v. *Pump House, Inc.*, 821 F.2d 566, 568 (11th Cir. 1987) (union's fraud in the inducement).

including the identification and interpretation of ambiguous terms. In addition, Congress anticipated that, following the enactment of Section 515, employers would still be permitted to assert "defenses [ ]related to the employer's promise and the plans' entitlement to the contributions." *Ibid.*

The use of extrinsic evidence to show ambiguity in a CBA, and the defense of "extrinsic ambiguity" or "idiosyncratic meaning," is permissible under Section 515 because it directly relates to the employer's promise and the fund's entitlement to enforce that promise. Consider a CBA in which the employer promises to make contributions for all employees who work aboard the ship "Peerless." Cf. *Raffles* v. *Wichelhaus*, 2 H. & C. 906, 159 Eng. Rep. 375 (Ex. 1864). The employer, its employees, the labor union, and the pension fund all understand that the term "Peerless" refers to a ship moored in the Potomac River, and over the term of the CBA contributions are made for all employees who work aboard that vessel. If the employer owned a second vessel moored in Lake Michigan, also called "Peerless," the pension fund could bring a Section 515 action to recover contributions for the employees who work for the same employer on the second Peerless, arguing that the CBA, by its plain terms, requires contributions for all employees who serve on the ship "Peerless." The CBA is not internally ambiguous regarding the meaning of the term "Peerless." Thus, if the employer is foreclosed from demonstrating that there are two ships, and that the fund (like the parties) understood from the beginning that contributions would be made only for the employees on the Peerless in the Potomac, then the fund would succeed in recovering contributions that were never promised and to which it was not entitled.

As this Court and several lower courts have recognized, Section 515 does not permit pension funds to collect contributions in excess of those expressly provided for in the CBA. In *Advanced Lightweight Concrete*, the Court rejected a fund's contention that Section 515 requires employers to continue making contributions after the CBA terminates and negotiations for

a successor agreement commence. See 484 U.S. at 542-543. The Court explained there that "both the text and the legislative history of Section 515 [ ] provide firm support for the Court of Appeals' conclusion that this remedy is limited to the collection of 'promised contributions.'" *Id.* at 548-549. Although Section 515 immunizes funds from certain contract defenses that might defeat claims asserted by a union, as the court below acknowledged in its first opinion in this case (see App., *infra*, 52a), the statute does not allow funds to "enforce [ ] nonexistent contractual obligation[s]." See *Ralph's Grocery*, 118 F.3d at 1022; *DeVito* v. *Hempstead China Shop, Inc.*, 38 F.3d 651, 654 (2d Cir. 1994); *Rolls-Royce*, 989 F.2d at 138.[6]

Neither decision of the court below cited any portion of the statute or the legislative history in support of the court's rule precluding the use of extrinsic evidence in Section 515 actions to show that a contract term is ambiguous. Instead, the panel cited the court's *Gerber Truck* decision for the proposition that funds are entitled to "enforce the writings according to their terms," and its *Joe McClelland, Inc.* decision for the uncontroversial principle that oral understandings between the employer and the union cannot defeat the fund's action to enforce the written CBA. See App., *infra*, 11a (citing *Gerber Truck*, 870 F.2d at 1149; *Joe McClelland, Inc.*, 23 F.3d at 1257-1258). But the notion that funds can enforce CBAs "according to their terms," despite the funds' awareness of and acquiescence in the contrary interpretation of the parties, simply cannot be reconciled with the purpose of Section 515, which was intended to encourage employers to make all *promised* contributions.

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[6] See also *Trustees of ALA-Lithographic Pension Plan* v. *Crestwood Printing Corp.*, No. 99 CIV. 4432 (CBM), 2001 WL 30655, at *5 (S.D.N.Y. Jan. 12, 2001); *Demolition Workers Union* v. *Mackroyce Contracting Corp.*, No. 97 CIV. 4094 (LMM), 2000 WL 297244, at *3 (S.D.N.Y. Mar. 22, 2000); *Iron Workers Dist. Council Welfare & Pension Funds* v. *Butler Fence Co.*, 919 F. Supp. 589, 595 (N.D.N.Y. 1996).

The statute achieves that objective by sanctioning employers that present a collective agreement to the fund for approval and then secretly agree with the union that some portion of the contributions required under the CBA will not be made. When employers and unions engage in this deception, the fund is unable to make an informed decision about whether the contribution levels are adequate and whether the bargaining group is defined in an acceptable fashion. Moreover, assuming the fund accepts the CBA, it cannot calibrate its actuarial assumptions if the CBA presented to the fund does not accurately describe the group of employees for whom the fund may be required to provide benefits. As the court below has observed, Section 515 would be wholly ineffectual if it "allowed persons to do in secrecy what they could not do openly." *Gerber Truck*, 870 F.2d at 1155 (predicting that if the employer and the union in that case had requested coverage after revealing their true agreement to the funds, the funds "would have replied 'No'"). Here, petitioner openly revealed its collective agreement to respondent, and then proceeded to make all contributions required by the CBA, as it had been consistently interpreted during the past 14 years by petitioner, respondent, the union, and the employees. Section 515 and the collective agreement required nothing more of petitioner, and it was error for the court below to impose on petitioner obligations that it and the union never undertook in their CBA.

The Seventh Circuit justified its disregard of extrinsic evidence by resort to its line of decisions requiring special rules of contract construction under Section 515, and it is the Seventh Circuit's statutory construction that petitioner asks this Court to review. But it bears mention as well that, through its erroneous construction of Section 515, the decision below runs contrary to basic principles of contract interpretation. This Court announced nearly a century ago that it had "no doubt" that extrinsic evidence may be considered to ascertain the meaning of contract terms. See *Lowrey* v. *Territory of Hawaii*, 206 U.S. 206, 221-222 (1907) (remarking that "[s]o obvious and potent a principle hardly needs the repetition it has received"); accord

Old Colony Trust, 230 U.S. at 118 ("the practical interpretation of a contract by the parties to it for any considerable period of time before it comes to be the subject of controversy is deemed of great, if not controlling, influence").

In *Brooklyn Ins. Co.* v. *Dutcher*, 95 U.S. 269, 273 (1877), the Court acknowledged the importance of extrinsic evidence of the parties' course of performance in resolving disputes over the meaning of contract terms: "There is no surer way to find out what parties meant, than to see what they have done. Self-interest stimulates the mind to activity, and sharpens its perspicacity. * * * In considering the question before us, it is difficult to resist the cogency of this uniform [construction by the parties] during the period mentioned, as a factor in the case."

Without the benefit of extrinsic evidence, it can be impossible for courts to comprehend the meaning of an agreement, and to resolve "the effect to be given to the words of which it is composed." *Reed* v. *Merchants' Mut. Ins. Co.*, 95 U.S. 23, 30 (1877).[7] Indeed, as the outcome in this case makes manifest, the

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[7] Most commentators agree that extrinsic evidence should be admitted even when the terms of a contract appear to be unambiguous. See RESTATEMENT (SECOND) OF CONTRACTS § 210 cmt. b (1981) ("[A] writing cannot of itself prove its own completeness, and wide latitude must be allowed for inquiry into circumstances bearing on the intention of the parties."); UNIFORM COMMERCIAL CODE § 2-208 cmt. 1 (1989) ("The parties themselves know best what they have meant by their words of agreement and their action under that agreement is the best indication of what that meaning was."); 5 ARTHUR CORBIN & MARGARET KNIFFIN, CORBIN ON CONTRACTS § 24.16 (rev. ed. 1998) ("Great weight can appropriately be given to a course of performance by a party that clearly indicates an interpretation contrary to the view later urged in court by the same party."); 11 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 30:5 (4th ed. 1999 & Supp. 2000) ("Under the prevailing, more expansive view of what the court may consider, the court does not simply determine whether, from its perspective, the contractual language is clear; rather, the court hears the proffer of the parties and determines if there are objective indicia that, from the parties' linguistic reference point, the contract's terms are susceptible of different meanings."). The trend in the state courts is toward abolishing the "plain meaning" rule in favor of allowing extrinsic evidence even where the contract

disregard of all extrinsic evidence in favor of a rigid adherence to the four corners of the CBA "often leads to erroneous results, and misinterprets the meaning of the parties." *Ibid.*

In 1977, Kroger, with the union's consent, began classifying all of its new hires at the Atlanta facility as "casuals." App., *infra,* 6a. This treatment, reflected thereafter in the Local Supplement language, created a different, longer track to the status of regular employee on the regular seniority list for newly hired Atlanta warehouse employees than the probationary trial period set forth in the Master Agreement. As the district court acknowledged in its first opinion, the undisputed facts confirmed that "the employees designated as 'casuals' or 'part-timers' by the Atlanta Center were consistently handled as true 'casual' laborers within the meaning of the CBA." *Id.* at 64a. Among other things, casuals, in accordance with the CBA, were not placed on the regular seniority list, did not have regular work schedules, did not exceed ten percent of petitioner's workforce, and did not receive pension contributions. *Id.* at 62a, 64a. Casual employees who successfully bid for a regular position *then* completed a probationary period *and* were placed on the regular seniority list, and *only* at that point did petitioner begin making pension contributions for them. *Id.* at 5a, 44a. The union knew from 1977 forward that new employees were being classified as "casuals" and made no objection to this interpretation of the collective agreement for 14 years. *Id.* at 6a, 25a (finding that both the union and the employees understood that new hires would not receive pension contributions until they obtained a position on the regular seniority list).

Respondent was fully aware that petitioner and the union were classifying new hires as "casuals" in keeping with their interpretation of the CBA. Robert "Jerry" Cook, a trustee of the fund, also served as the union president and was one of the local

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is not ambiguous on its face. See 5 CORBIN, *supra,* § 24.7 (observing that state courts have increasingly allowed the introduction of extrinsic evidence without limitation).

union representatives who, the district court found, had acquiesced in the classification of new employees as casuals. See App., *infra,* 25a. Cook also closely monitored the 1991 Step 3 grievance proceeding, which upheld petitioner's and the union's longstanding interpretation of the term "casual." Cook considered the Step 3 Committee's decision to be a final resolution of the matter. C.A. Supp. App. 50. See *General Drivers, Warehousemen & Helpers* v. *Riss & Co.*, 372 U.S. 517, 519-520 (1963) (holding that courts should uphold grievance committee decisions that are accorded finality under the CBA). In addition, respondent received monthly reports from petitioner showing a significant gap between the date of hire of the casual employees and the date on which petitioner began making contributions for them. Nevertheless, respondent made no objection to this designation of new hires as casuals until 1991, when new auditors at respondent asserted that the CBA could be interpreted in a manner that would require petitioner to make additional contributions. See App., *infra,* 23a. The district court should have considered the extrinsic evidence of the fund's knowledge in resolving the meaning of the term "casual" because "the practical interpretation of an agreement by a [beneficiary of] it is always a consideration of great weight." *Brooklyn Ins. Co.*, 95 U.S. at 273. Not only did respondent have an obvious financial interest in collecting all the contributions due under the collective agreement, but it also had a fiduciary *duty* to take corrective action if petitioner was breaching its pension obligations. See *Rosen* v. *Hotel & Rest. Employees & Bartenders Union*, 637 F.2d 592, 599-600 (3d Cir. 1981) (recognizing that funds are required to "notify the pensioner of his employer's failure to contribute to the fund as required by the pension agreement"). Respondent's long-term acquiescence was probative extrinsic evidence of respondent's interpretation of the CBA, and the court below erred in disregarding it.

III. WHETHER AND WHEN EXTRINSIC EVIDENCE MAY BE EXAMINED IN CONSTRUING CBAs IS AN IMPORTANT AND RECURRING ISSUE

It cannot seriously be disputed that this case presents an important question of federal law, the resolution of which will have a profound impact on the tripartite relationship of employer, labor union, and pension fund. Although this Court has described ERISA as "enormously complex and detailed," *Mertens* v. *Hewitt Assocs.*, 508 U.S. 248, 262 (1993), and as a "comprehensive and reticulated statute," *Nachman Corp.* v. *Pension Benefit Guar. Corp.*, 446 U.S. 359, 361 (1980), Section 515 neither allows nor disallows the use of extrinsic evidence in construing the scope of an employer's obligation to make pension contributions pursuant to a CBA. Instead, Congress left this question to be resolved as part of the "body of Federal substantive law [that must] be developed by the courts to deal with issues involving rights and obligations under private welfare and pension plans." *Franchise Tax Bd.* v. *Construction Laborers Vacation Trust*, 463 U.S. 1, 24 n.26 (1983) (quoting 120 Cong. Rec. 29942 (1974) (remarks of Sen. Javits)); see also *Firestone*, 489 U.S. at 110 (recognizing the need for a "federal common law of rights and obligations under ERISA-regulated plans").

In the 20 years since Section 515 was enacted, the lower courts have failed to reach consensus regarding the legitimate uses of extrinsic evidence in disputes related to an employer's obligation to make pension contributions. The conflicting rules evolving in the lower courts have created chaos at the bargaining table, leaving employers and unions without any confidence that CBAs reached after collective bargaining will be enforced in accordance with the interpretation shared by the employer, the employees, the union, and the pension fund. The need for guidance from this Court is now acute.

As this Court has recognized, the interpretation of CBAs is a subject matter that "peculiarly [ ] calls for uniform law." *Lucas Flour*, 369 U.S. at 103 (observing that the need for a single body of federal law under Section 301(a) of the Labor

Management Relations Act is "particularly compelling"); see also *Allis-Chalmers Corp.* v. *Lueck*, 471 U.S. 202, 211 (1985) ("[Q]uestions relating to what the parties to a labor agreement agreed, and what legal consequences were intended to flow from breaches of that agreement, must be resolved by reference to uniform federal law."). In *Lucas Flour*, the Court considered whether the States were authorized to apply their own decisional law to disputes over the interpretation of CBAs subject to Section 301(a) of the LMRA. In holding that a single body of law must govern, the Court noted that any other result "would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements." 369 U.S. at 103.

This case involves a conflict among federal courts over the interpretation of ERISA § 515, not any issue under LMRA § 301, but the intolerable consequence of the current state of affairs is the same. The possibility that collective bargaining terms might be interpreted differently in circuits with different extrinsic evidence rules is difficult to plan for. After the formation of the CBA, the employer begins making the pension contributions provided for in the agreement, under the watchful eyes of the union and the pension fund. It is not until the fund makes a demand for allegedly delinquent contributions that the employer discovers that the CBA may be susceptible to more than one interpretation if, as here, enforcement is sought in a jurisdiction that excludes extrinsic evidence of the parties' and the fund's course of performance. As Judge Easterbrook observed in his dissenting opinion in *Bidlack*, the risk of a "gotcha!" surprise award at the end of a collective bargaining term affects the negotiation of future agreements, leading employers to "rationally reduce their promises to take account of increased risk." *Bidlack*, 993 F.2d at 619 (Easterbrook, Bauer, Coffey & Manion, JJ., dissenting).

Small employers that assent to certain standardized provisions as part of a multi-employer CBA may rely on the meaning ascribed to a particular term by one court on the basis of extrinsic evidence, only to discover that the same term has a

very different meaning in a circuit where extrinsic evidence is excluded. Congress has perceived multi-employer bargaining to be a "vital factor in the effectuation of the national policy of promoting labor peace through strengthened collective bargaining." See *NLRB* v. *Truck Drivers Local Union No. 449, Int'l Bhd. of Teamsters, Chauffers, Warehousemen, and Helpers of Am.*, 353 U.S. 87, 95 (1957). Among its other benefits, multi-employer bargaining streamlines the bargaining process, encourages the development of industry-wide worker benefits programs that smaller employers could not otherwise afford, and inhibits employer competition at the workers' expense. See *Charles D. Bonanno Linen Serv., Inc.* v. *NLRB*, 454 U.S. 404, 409 n.3 (1982). As of 1996, multi-employer bargaining accounted for more than 40 percent of all major CBAs, and had become prevalent in the construction, transportation, retail trade, clothing manufacture, and real estate industries. See *Brown* v. *Pro Football, Inc.*, 518 U.S. 231, 240 (1996). A cautious employer might rationally conclude that the benefits associated with multi-employer CBAs are more than outweighed by the risk that critical terms will be construed differently in different circuits with varying extrinsic evidence rules.

Larger employers that are subject to personal jurisdiction in multiple States, like petitioner (and like most grocery-store chains, given the current concentrated structure of the industry), are exposed to the additional risk that pension funds will prosecute their Section 515 actions in the circuit with the extrinsic evidence rule most favorable to the fund's interpretation of the CBA. Differences in the rules governing ERISA actions "may have the troubling effect of encouraging forum shopping by plaintiffs." *Mason* v. *Continental Group, Inc.*, 474 U.S. 1087, 1087 (1986) (White & Brennan, JJ., dissenting from denial of certiorari).

Finally, there is no doubt that the issue presented in this case arises with overwhelming frequency. From 1980, when Section 515 was enacted, through January 2001, federal courts have issued more than 30 decisions discussing the proper role

of extrinsic evidence in resolving claims by pension funds for allegedly delinquent contributions.[8] During this same period,

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[8] *Trustees of Colorado Tile, Marble & Terrazzo Workers Pension Fund* v. *Wilkinson & Co.*, 134 F.3d 383, 1998 WL 43172 (10th Cir. Feb. 3, 1998); *Ralph's Grocery Co.*, 118 F.3d 1018; *Illinois Conference of Teamsters & Employers Welfare Fund* v. *Mrowicki*, 44 F.3d 451 (7th Cir. 1994); *DeVito*, 38 F.3d 651; *Connors* v. *Fawn Mining Corp.*, 30 F.3d 483 (3d Cir. 1994); *Brown* v. *Health Care & Ret. Corp. of Am.*, 25 F.3d 90 (2d Cir. 1994); *Rolls-Royce*, 989 F.2d 132; *Board of Trs.* v. *California Co-op. Creamery*, 877 F.2d 1415 (9th Cir. 1989); *Connors*, 867 F.2d 625; *Elks Lodge B.P.O.E. No. 1450*, 827 F.2d 1324; *Arizona Laborers, Teamsters & Cement Masons Local 395 Health & Welfare Trust Fund* v. *Conquer Cartage Co.*, 753 F.2d 1512 (9th Cir. 1985); *Carpenters Amended & Restated Health Benefit Fund* v. *Holleman Constr. Co.*, 751 F.2d 763 (5th Cir. 1985); *Operating Eng'rs Pension Trust* v. *Gilliam*, 737 F.2d 1501 (9th Cir. 1984); *Crestwood Printing Corp.*, 2001 WL 30655; *Demolition Workers Union*, 2000 WL 297244; *Northwest Adm'rs, Inc.* v. *Sacramento Stucco*, 86 F. Supp. 2d 974 (N.D. Cal. 2000); *Mazzei* v. *Rock-N-Around Trucking, Inc.*, No. 99-C-1975, 2000 WL 152137 (N.D. Ill. Feb. 4, 2000); *Beverage Indus. Local No. 744 Health & Welfare Fund* v. *Quality Beers Ltd. P'ship*, 58 F. Supp. 2d 910 (N.D. Ill. 1999); *Alston* v. *Dollar Rent a Car Sys., Inc.*, No. 96-Civ-7531 (JSM), 1998 WL 531828 (S.D.N.Y. Aug. 24, 1998); *Chicago Area I.B. of T. Health & Welfare Trust Fund* v. *Kennicott Bros. Co.*, No. 95-C-1229, 1998 WL 122777 (N.D. Ill. Mar. 16, 1998); *Moriarty* v. *Svec*, 994 F. Supp. 963 (N.D. Ill. 1998), vacated, 233 F.3d 955 (7th Cir. 2000); *Hanley* v. *Smithfield Cafe, Inc.*, No. 96-C-0980, 1997 WL 639034 (N.D. Ill. Oct. 6, 1997); *Hanley* v. *Herrill Bowling Corp.*, No. 94-Civ-4611 (RPP), 1995 WL 428966 (S.D.N.Y. July 20, 1995); *Wenzel* v. *Jeff Parking Corp.*, No. 94-Civ-0831 (AJP), 1995 WL 258055 (S.D.N.Y. May 3, 1995); *NYSA-ILA Med. & Clinical Servs. Fund* v. *Golten Marine Co.*, No. 91-Civ-4707, 1994 WL 800706 (S.D.N.Y. Dec. 21, 1994); *Laborers' Pension Fund* v. *National Wrecking Co.*, No. 90-C-5499, 1994 WL 513589 (N.D. Ill. Sep. 16, 1994); *International Bhd. of Elec. Workers Local No. 683 Pension Trust* v. *Advantage Enters., Inc.*, 813 F. Supp. 592 (S.D. Ohio 1993); *In re United Mine Workers of Am. Employee Ben. Plans Litig.*, 782 F. Supp. 658 (D.D.C. 1992), aff'd, 984 F.2d 469 (D.C. Cir. 1993); *Board of Trs. of Local 41, Int'l Bhd. of Elec. Workers Health Fund* v. *Zacher*, 771 F. Supp. 1323 (W.D.N.Y. 1991), rev'd, 962 F.2d 225 (2d Cir. 1992); *Scotto* v. *Brink's Inc.*, 751 F. Supp. 335 (E.D.N.Y. 1990); *Trustees of Carpenters Health & Welfare Trust Fund* v. *Universal Constr. Servs.*, 695 F. Supp. 554 (S.D. Fla. 1988); *Pattern Makers' Pension Trust Fund* v. *Badger Pattern Works, Inc.*, 615 F. Supp. 792 (N.D. Ill. 1985); *Lewart* v. *Woodhull Care Ctr. Assocs.*, 549 F. Supp. 879 (S.D.N.Y. 1982).

respondent alone filed numerous Section 515 lawsuits, and disputes concerning the use of extrinsic evidence in these cases resulted in the publication of nine appellate decisions.[9] The frothing tide of ERISA litigation in the lower courts has not escaped the notice of this Court. To the contrary, Justices White and Brennan have observed that the "increasing significance of ERISA litigation is apparent from the growing number of such cases that appear on our docket." *Mason*, 474 U.S. at 1087 (dissenting from denial of certiorari). Guidance from this Court is necessary to ensure that employers' written pension promises are enforced in a manner consistent with the longstanding interpretation of those promises by the employees, the employer, the union, and the pension fund.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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[9] *Central States, S.E. & S.W. Areas Pension Fund* v. *Kroger Co.*, 226 F.3d 903 (7th Cir. 2000) (decision below); *Brown-Graves Co.*, 206 F.3d 680; *Central States, S.E. & S.W. Areas Pension Fund* v. *Transport, Inc.*, 183 F.3d 623 (7th Cir. 1999); *Central States, S.E. & S.W. Areas Pension Fund* v. *Kroger Co.*, 73 F.3d 727 (7th Cir. 1996); *Central Cartage Co.*, 69 F.3d 1312; *Joe McClelland, Inc.*, 23 F.3d 1256; *Central States, S.E. & S.W. Areas Pension Fund* v. *Hartlage Truck Service, Inc.*, 991 F.2d 1357 (7th Cir. 1993); *Independent Fruit*, 919 F.2d 1343; *Gerber Truck*, 870 F.2d 1148; *Robbins* v. *Lynch*, 836 F.2d 330 (7th Cir. 1988).

APPENDIX A

In the
United States Court of Appeals
for the Seventh Circuit

NOS. 99-2257 & 99-3014

CENTRAL STATES, SOUTHEAST AND
SOUTHWEST AREAS PENSION FUND, and
HOWARD McDOUGALL,

Plaintiffs-Appellees,

KROGER COMPANY,

Defendant-Appellant.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division.
No. 93 C 3669 - **John F. Grady**, *Judge.*

ARGUED FEBRUARY 17, 2000–DECIDED SEPTEMBER 15, 2000

Before HARLINGTON WOOD, JR., COFFEY and RIPPLE, *Circuit Judges.*

RIPPLE, *Circuit Judge*. Central States, Southeast and Southwest Areas Pension Fund (the "Fund") brought this action under § 515 of ERISA, 29 U.S.C. § 1145, against the Kroger Co. ("Kroger") to recover delinquent pension contributions for certain employees at Kroger's warehouse center in Atlanta, Georgia. Kroger's obligation to make these contributions is defined by a Collective Bargaining Agreement ("CBA") negotiated by Kroger and the union representing the Atlanta employees.

This is a successive appeal; familiarity with our first opinion is assumed. *See Central States, Southeast & Southwest Areas Pension Fund v. Kroger Co.*, 73 F.3d 727 (7th Cir. 1996) ("*Kroger I*"). In that opinion, we held that the meaning of "part-time," as used in the CBA, was ambiguous. We explained that "part-time" could refer either to regular employees who worked a shorter week or to "casual" employees. *See id.* at 732. Because of this ambiguity we remanded the case to the district court for a determination of the meaning of part-time. *See id.* at 733.

After additional discovery and a bench trial, the district court resolved the ambiguous meaning of "part-time" in favor of the Fund by holding that "part-time" employees were "regular employees," not casual employees, and that the Fund, therefore, was entitled to the disputed contributions. The district court entered a judgment in favor of the Fund on liability and later supplemented its judgment with an award of attorneys' fees and costs to the Fund. For the reasons set forth in the following opinion, we affirm the judgment of the district court.

I
BACKGROUND
A.

Kroger is a national grocery store chain with operations in several states, including Georgia. The warehouse employees and truck drivers at Kroger's warehouse center in Atlanta are represented by the Local 528 chapter of the International

Brotherhood of Teamsters (the "Union"). Since 1967, the employment relationship between Kroger and its employees at this facility has been governed by a CBA negotiated by Kroger and the Union. Kroger's participation in the Fund began in 1971, and the CBA has defined Kroger's obligation to make pension contributions to the Fund on behalf of the Atlanta employees. The CBA between Kroger and the Union, although one document, consists of two parts. The first part, the Master Agreement, was negotiated by Kroger and the Union and covers the Atlanta facility as well as several other Kroger facilities nationwide. The second part of the CBA, the Local Supplement, applies only to the Atlanta facility. As we explained in our previous opinion, both the Master Agreement and the Local Supplement form "a single, unitary contract" and, consequently, must be read together. *Kroger I*, 73 F.3d at 731.

The Master Agreement defines who is a regular employee and also differentiates between two other types of employees — "probationary" and "casual." Probationary employees are defined as "new" employees who work on a trial basis for 30 to 60 days and who may be discharged at Kroger's discretion. CBA § 2.2. They become regular employees at the end of their trial period and, according to the Master Agreement, "shall be placed on the regular seniority list." CBA § 2.2. On the other hand, "casual" employees are defined as employees "hired on a short term basis." CBA § 2.3. The Master Agreement states that casual employees "may be employed from time to time" for those facilities with a past practice of hiring casuals. It contains no specific limit on the duration of a casual employee's service. The number of casual employees is limited to 10 percent of the work force. *See* CBA § 2.3. The CBA provides that casual employees "shall not receive fringe benefits or accrue seniority." CBA § 2.3.

Under the CBA, Kroger is obligated to make pension contributions for each employee who has been employed for 30 days or more and who is on the "regular seniority list." CBA § 31.1. As we explained in our previous opinion, "[t]he effect of this

provision is that Kroger is required to make contribution to the Fund on behalf of all probationary employees who had completed their trial period, but not on behalf of casual employees." *Kroger I*, 73 F.3d at 729. Furthermore, the Master Agreement states that Kroger must make contributions to the Fund for "each regular or extra employee, even though such employee may work only *part-time*." CBA § 31.4 (emphasis added). No contribution is required for employees "who work either temporarily or in cases of emergency." CBA § 31.4.

Unlike the Master Agreement, the Local Supplement does not differentiate between "probationary" and "casual" employees. Instead, the Local Supplement refers to "part-time" and "full-time" employees, but it defines neither of these terms. The Local Supplement also refers to part-time employees as "part-timers." A few characteristics of part-time employment nevertheless emerge from the Local Supplement. First, the Local Supplement caps the number of "part-time" employees at 10 percent of the warehouse employees. *See* CBA II.A.6. Also, part-time employees are permitted a limited form of seniority: They may accrue seniority "only among other part time employees." CBA II.D.2. Finally, part-time employees must follow certain job-bidding procedures to obtain regular positions.

The job-bidding process for part-time employees first became part of the Local Supplement in 1985. Under the procedure established in 1985, when a permanent job became available, the most senior part-timer was required to bid on the position. *See* CBA II.D.1. Failure to bid or to bid successfully would result in termination from Kroger. The bidding procedure was modified in 1988 so that part-timers were given an opportunity to bid for a second regular position if they failed to obtain a position on their first bid. *See* CBA II.D.1 (1988). Starting in 1985 and continuing through the 1988 change, the bidding procedure set forth in the Local Supplement specified that a part-timer who had obtained a bid position was required to work in that position for a "trial period" of 21 days. CBA II.D.1. If the employee's performance

proved to be unsatisfactory during this trial period, the Local Supplement allowed Kroger to return the employee to his former part-time position.

Prior to 1977, all newly hired employees at Kroger's Atlanta facility were designated as probationary. In 1977, however, Kroger began classifying all new employees at the Atlanta facility as casuals. These employees were not guaranteed fixed hours or schedules. Kroger would place the new hires on a separate seniority list, but those employees on the list did not have any seniority status over regular employees. Rather, the list was used to allow these employees, who commonly were referred to as "part-timers" at the Atlanta facility, to bid (in order of date of hire) for regular jobs as those jobs became available. Many of the employees hired as casuals remained with Kroger for a lengthy period of time and eventually became regular employees through the bidding process. Once a part-timer became a regular employee and was placed on the regular seniority list, Kroger made pension contributions on behalf of that employee to the Fund. As long as the employee was designated as a casual, however, no contribution was made.

B.

In 1991, the Fund conducted an audit of the employment records at Kroger's Atlanta facility and concluded that, between December 28, 1986, and December 30, 1989, Kroger had failed to make pension contributions required under the CBA for certain warehouse employees. The Fund therefore brought this action against Kroger under § 515 of ERISA; it alleged that Kroger owed the Fund over $200,000 in delinquent contributions.

In our previous opinion, we reversed the district court's grant of summary judgment in favor of Kroger. The district court had determined that the CBA was unambiguous and had declared its meaning as a matter of law. On appeal, we examined the CBA as a whole and concluded that the term "part-time," as it was used in

the CBA, was susceptible to more than one reasonable meaning. "Part-time," we explained, could mean "casual" or it could refer to "a regular employee who works a shorter week." *Kroger I*, 73 F.3d at 732. Because the term "part-time" had more than one reasonable interpretation, we held the CBA to be ambiguous. Consequently, the meaning of the CBA could not be determined as a matter of law, and we remanded the case "for a determination of the meaning of part-time." *Id.* at 733.

C.

1.

On remand, the district court allowed additional discovery and then conducted a bench trial. At the conclusion of the trial, the district court announced from the bench the four findings of fact that would form the basis of its final decision. Those findings of fact were:

> First, the employees in question were not "hired on a short-term basis," nor were they "employed from time to time," as defined in article 2.3 of the master portion of the [CBA].
>
> My second finding of fact is based upon the first one. It is that the phrase "part-time" in the local portion of the agreement is not the same as and does not mean "casual" as defined in article 2.3 of the master portion of the agreement.
>
> My third finding of fact is that the local union representatives and the negotiators acquiesced in the treatment of all new hires as "part-timers" not entitled to pension and welfare contributions from at least 1977 through the end of the audit period and beyond. These employees were told by management that they would not be [en]titled to benefit contributions until they had successfully bid for regular employment and had been

> placed on the regular seniority list. The employees fully understood that.
>
> My fourth finding of fact is that the term "part-time" in the local portion of the agreement was interpreted by the company and the local union representatives as referring to these employees who had not been placed on the regular seniority list and who, by reason of that fact, would not be eligible for benefit contributions, regardless of the length of time they had been employed by the company.

Tr. 8-B at 1005-06.

The district court also elaborated on these findings. The court observed that the employees could not have been hired on a "short-term basis" because "the employees in question were hired by Kroger with the hope and the expectation that they would become, each of them, full-time regular employees when an opening occurred." *Id.* at 1003-04. Although Kroger may have known that there was nothing inevitable about its employees becoming full-time regular employees, the court explained, Kroger's "hope was that the training that would be given to these employees would be utilized by the employees to complete their probationary period successfully and to equip themselves to become full-time employees when the opportunity arose." *Id.* at 1004. Moreover, the court noted, the employees in question could not have been "employed from time to time," according to the court, because that phrase referred to "people who come and go, people whose employment is interrupted, people who might be absent for long periods of time," and did not refer to people "who are on hand continuously to work part-time as needed." *Id.* at 1005. In the district court's view, the evidence showed that the employees in question were available, and were considered to be available by Kroger, "on a continuous basis to work part-time as needed during the peaks and valleys" of Kroger's Atlanta operation. *Id.* "These employees," continued the court, "were just

as continuous as the peaks and valleys were." *Id.* The district court further explained that the content of the employee handbooks Kroger had provided to its new hires, as well as the manner in which the employees had been trained and nurtured, demonstrated that the employees in question "were by no means regarded as people who were likely to be on hand for only a short period of time." *Id.* at 1004. To the contrary, the court explained, "it was expected that in the normal course, [these employees] would work for a long period of time, both as what was referred to as part-timers, and then eventually as people who achieved regular employment and got on the regular seniority list." *Id.*

2.

The district court later issued a written decision memorializing its findings of fact and addressing the issue of liability. The district court explained that the starting point for its analysis was to consider "whether the evidence show[ed] the Atlanta warehouse employees in question were treated as 'casual' by the company and the union as that term is used in the [CBA]." R.197 at 2. According to the district court, the efforts of the parties to prove that the term "part-time" in the Local Supplement either was or was not synonymous with "casual" had proved to be "largely unpersuasive." *Id.* In the district court's view, "[t]he union and company witnesses [had] attempted reenactments that are contrary to the way they acted at the time." *Id.* at 3.[1] Moreover, the district court concluded, "[t]he fact is that the local union and company representatives acted according to their own lights, with little or no regard to whether their mutual understanding of whom would be paid fringe benefits comported with the terms of the master agreement." *Id.* at 2. Indeed, the court found that "[i]f the matter

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[1] As an example, the district court noted that one of Kroger's witnesses had testified that the employees at the Atlanta facility were commonly referred to as "part-time casual." R.197 at 3. This testimony, in the district court's estimation, was not credible; according to the court, the employees "would have been described as 'part-time,' or 'casual,' but not both." *Id.*

had been left to the local union representatives, no question of contributions for these employees would ever have arisen." *Id.* at 2-3.

In the end, the court concluded, its third and fourth findings of fact manifested "'local' understandings" that "cannot prevail against the definition of 'probationary' employees" contained in the Master Agreement. *Id.* at 5. Because the employees were not casual, the district court held that they necessarily were probationary. The employees in question, the district court concluded, were "regular employees who worked a shorter week," or, in any event, were not "casual" employees as defined by the Master Agreement. *Id.* at 5-6. Thus, because the employees were probationary, the court held that Kroger was required to make contributions to the Fund for the employees in question.

Based on its holding that Kroger should have made pension contributions for the employees in question, the district court awarded damages to the Fund totaling $446,946.07. The district court also awarded attorneys' fees, costs, and double interest to the Fund as provided by 29 U.S.C. § 1132(g)(2). According to the district court, Kroger did not contest the amount of attorneys' fees and costs, so the court awarded the amount requested by the Fund.

II
DISCUSSION
A.

We review de novo a district court's interpretation of a contract. *See Moriarty v. Svec*, 164 F.3d 323, 330 (7th Cir. 1998). When a contract is unambiguous, the court may declare its meaning as a matter of law. *See Kroger I*, 73 F.3d at 732. But when a contract is ambiguous, questions of interpretation are to be resolved by the trier of fact. *See id.*; *Jos. Schlitz Brewing Co. v. Milwaukee Brewery Workers' Pension Plan*, 3 F.3d 994, 999 (7th Cir. 1993). We review de novo a district court's determination of the meaning of an ambiguous contract term, *see WH Smith Hotel Servs., Inc. v.*

Wendy's Int'l, Inc., 25 F.3d 422, 428 (7th Cir. 1994); *LaSalle Nat'l Bank v. Service Merchandise Co.*, 827 F.2d 74, 78 (7th Cir. 1987), as well as the court's factual findings following a bench trial, *see* Fed. R. Civ. P. 52(a); *Brunswick Leasing Corp. v. Wisconsin Central, Ltd.*, 136 F.3d 521, 525 (7th Cir. 1998).

Thus, in this case Kroger has the "difficult, though not insurmountable" burden of showing that the district court's factual findings are clearly erroneous. *Brunswick*, 136 F.3d at 526. "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948). "Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Anderson v. Bessemer City*, 470 U.S. 564, 574 (1985). If the district court's account of the facts is plausible in light of the record viewed in its entirety, we may not reverse that decision even if we may have decided the case differently. *See id.* at 573-74 (noting that if there are two possible understandings of the evidence, the factfinder's conclusion cannot be clearly erroneous); *Salus v. GTE Directories Serv. Corp.*, 104 F.3d 131, 135-36 (7th Cir. 1997) (applying these principles in an ERISA case). Furthermore, any reasonable doubts we may harbor should be resolved in favor of the district court's ruling "in light of its greater immersion in the case." *Cook v. City of Chicago*, 192 F.3d 693, 697 (7th Cir. 1999).

B.

1.

The statutory basis for the Fund's claim against Kroger is § 515 of ERISA, which provides:

> Every employer who is obligated to make contributions to a multiemployer plan under the terms of the plan or under the terms of a collectively bargained agreement shall, to the extent not inconsistent with law, make such

> contributions in accordance with the terms and conditions of such plan or such agreement.

29 U.S.C. § 1145. This section entitles pension funds to enforce the terms of agreements when those terms are unambiguous. *See Central States, Southeast & Southwest Areas Pension Fund v. Hartlage Truck Serv., Inc.*, 991 F.2d 1357, 1361 (7th Cir. 1993); *see also Central States, Southeast & Southwest Areas Pension Fund v. Gerber Truck Serv., Inc.*, 870 F.2d 1148, 1149 (7th Cir. 1989) (en banc) (stating that § 515 allows pension funds to "enforce the writings according to their terms"). Because pension funds are entitled to rely on the terms of a CBA, a fund's reliance upon those terms "may not be thwarted by oral understandings between the employer and the union," *Kroger I*, 73 F.3d at 731 (citing *Central States, Southeast & Southwest Areas Pension Fund v. Joe McClelland, Inc.*, 23 F.3d 1256, 1257-58 (7th Cir. 1994)), or by written side agreements between the employer and the union that have not been disclosed to the fund, *see Central States, Southeast & Southwest Areas Pension Fund v. Transport, Inc.*, 183 F.3d 623, 628 (7th Cir. 1999), or "by defenses that may defeat enforcement of the CBA between the employer and the union," *Kroger I*, 73 F.3d at 731 (citing *Gerber Truck*, 870 F.2d at 1153).

Federal common law rules of contract interpretation apply when we consider a contract in the context of an ERISA claim. *See Kroger I*, 73 F.3d at 731. The written word will prevail over the subjective understandings of the contracting parties unless the written agreement is truly ambiguous. *See Pabst Brewing Co. v. Corrao*, 161 F.3d 434, 442 (7th Cir. 1998); *Gerber Truck*, 870 F.2d at 1151-53. In our case, we have determined that the term part-time is ambiguous. When a court is interpreting an ambiguous term, the task of the court is to determine what "the contracting parties . . . intended the clause to mean." *In re Teamsters Indus. Employees Welfare Fund*, 989 F.2d 132, 136 (3d Cir. 1993). To determine what the contracting parties intended, the court may look at extrinsic evidence to determine the meaning the contracting parties attached to the ambiguous term. *See Moriarty*, 164 F.3d at

331 (citing *FDIC v. W.R. Grace & Co.*, 877 F.2d 614, 620-21 (7th Cir. 1989)); *see also Rossetto v. Pabst Brewing Co.*, 217 F.3d 539, 543 (7th Cir. 2000) (stating that, when an ambiguity "is apparent just from reading the contract," "evidence is admissible to cure" that ambiguity).

2.

During the bench trial, Kroger and the Fund presented the district court with the testimony of over 20 witnesses and with over 300 exhibits in their efforts to demonstrate that the parties to the CBA intended "part-time" to be either synonymous or not synonymous with "casual." Much of the evidence presented was conflicting. On appeal, Kroger and the Fund have devoted the majority of their arguments to the question of whether the district court correctly resolved the ambiguous meaning of "part-time" as that term was used in the CBA. We shall begin our analysis, however, by examining one of the unambiguous terms of the CBA — the term "casual employee."

Section 2.3 of the Master Agreement states that casual employees, who are hired on a "short term basis," may be "employed from time to time" at Kroger facilities with a history of hiring such employees. CBA § 2.3. The parties do not claim that the meaning of "casual," as it is used here, is ambiguous; nor have they questioned the meanings of "short-term basis" or "from time to time." Relying on the definition of a casual employee in § 2.3 of the CBA, the district court explained that it understood that term to refer to those employees that Kroger intended, when it hired them, to work for a short period of time. Casual employees, the court reasoned, would not be employees Kroger expected "in the normal course" to work "for a long period of time." Tr. 8-B at 1004. The court also explained that casual employees would be people "who come and go, people whose employment is interrupted, people who might be absent for long periods of time," rather than people "who are on hand continuously to work

part-time as needed." *Id.* at 1005. We agree with the district court's assessment of the meaning of "casual employee."[2]

The CBA's definition of "casual employees" is binding on Kroger. *See Joe McClelland,* 23 F.3d at 1257-58; *Gerber Truck,* 870 F.2d at 1149. Thus, in our previous decision in this case, we observed that "it is only if the employees at issue are truly casual, and not probationary, as those terms were understood by the parties to the CBA, that Kroger's reclassification of the Atlanta employees (and thus its failure to make contributions on their behalf) is permissible." *Kroger I,* 73 F.3d at 733. In applying the CBA's definition of "casual employee" to the facts of this case, the district court found in its first finding of fact that the employees in question were not casuals. Specifically, the district court found that these employees were not hired on a short-term basis because they were hired "with the hope and the expectation that they would become, each of them, full-time regular employees when an opening occurred." Tr. 8-B at 1003-04. Indeed, the court found, Kroger expected these employees, regardless of whether they stayed with Kroger, to "work for a long period of time, both as what was referred to as part-timers, and then eventually as people who achieved regular employment and got on the regular seniority list." *Id.* at 1004. Furthermore, the district court found that the

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[2] We note that the district court's understanding of the term "casual employee" is not only consistent with the terms of the CBA, it also comports with the dictionary definition of "casual employment." BLACK'S LAW DICTIONARY defines "casual employment" as:

> Employment at uncertain or irregular times. Employment for short time and limited and temporary purpose. Occasional, irregular or incidental employment. Such employee does not normally receive seniority rights nor does he normally receive fringe benefits.

BLACK'S LAW DICTIONARY 198 (5th ed. 1979); *see also Central States, Southeast & Southeast Areas Pension Fund v. Independent Fruit & Produce Co.,* 919 F.2d 1343, 1350 (8th Cir. 1990) (citing BLACK'S LAW DICTIONARY to define "casual employment" in a CBA lacking its own definition of the term).

employees in question were not employed "from time to time" because they were, in fact, "as continuous as the peaks and valleys" of Kroger's operation. *Id.* at 1005.

Kroger submits that the district court ignored the evidence of record and the parties' intent by concluding that the new hires were not "casuals." Instead, Kroger asserts, the new hires were hired on a "short-term basis" and were employed "from time to time," thus meeting the definition of "casuals" given in the Master Agreement. Kroger further submits that the employees in question must have been casuals because their employment was marked by characteristics of "casual" employment. They were not given set schedules; they had no weekly salary guarantees; and they served as fill-ins for Kroger's regular employees. After the new employees worked their first 30 days at Kroger, their status did not change, and most of the new hires never became regular employees. In fact, Kroger submits, 85 percent of them worked less than 12 weeks. Additionally, Kroger explains, until the employees obtained a bid position, they were not entitled to job benefits like progressive discipline, jury duty, and holidays--all benefits regular employees enjoyed. Therefore, Kroger submits, the new hires were "effectively" casual employees. Appellant's Br. at 25. Finally, Kroger takes issue with the district court's conclusion that Kroger expected every new hire to become a regular employee. This could not possibly be the case, Kroger submits, because it knew that only a small fraction would stay with the company more than a few weeks.

There is sufficient evidence in the record, however, to support the district court's conclusion that these employees were not "hired on a short term basis" or "employed from time to time." Thus, we cannot say that the district court's first finding of fact is clear error. The district court stated, in particular, that the employee handbooks and Kroger's "training and nurture" of its new hires persuaded the court that the employees in question were not casuals. Tr. 8-B at 1004. As an example, one of the employee handbooks used by Kroger welcomed them to the "Kroger team" and instructed them

to use the handbook "as a training tool and guide during your first several weeks at Kroger." R. 209, Ex. 92 at 971. The district court also found that, regardless of whether the employees stayed with Kroger for a long time, Kroger hired these employees with the intention that they would remain with the company and eventually become "regular" employees. Even though Kroger had a high turnover rate at the Atlanta facility, there was also evidence that eventually a new hire that stayed with the company either had to bid for a permanent position or, failing that, was fired. Here, we agree with the Fund that "[t]he ability to bid on permanent jobs is entirely at odds with the concept of casual employment which by contract definition, is short and indefinite," Appellee's Br. at 18, especially because there was evidence that it took six to nine months to get to the top of the "part-time" seniority list.

3.

Kroger nevertheless argues that the district court clearly erred because the court failed to resolve — or worse, incorrectly resolved — the ambiguity in the meaning of the term "part-time" as used in the CBA. According to Kroger, had the district court resolved the ambiguity correctly, it would have concluded, based on the record, that "the parties intended ['part-time'] to have a temporal meaning only in the Master Agreement, but to denote a status of employee, 'part-timers,' the employees at issue, in the Local Supplement." Appellant's Br. at 16. Furthermore, Kroger submits, the district court's third and fourth findings of fact warranted judgment for Kroger because those findings of fact evidenced the understanding of the parties to the CBA that "part-time," as used in the Local Supplement, referred to casual employees, who were not entitled to pension contributions. The district court's ruling, Kroger maintains, runs contrary to the meaning of "part-time" that Kroger and the Union, the parties to the CBA, intended when they contracted and have accepted since at least 1977.

Kroger correctly points out that, in general, the practical interpretation the parties to a contract have given that contract is strong evidence of their intended meaning for an ambiguous term.[3] Nonetheless, regardless of the terminology employed with respect to the "part-time" employees in Atlanta, Kroger and the Union simply could not have redefined "casual" in derogation of the clear meaning of that term provided in the CBA. Just as employers may not rely on oral or written side agreements when those agreements contravene the terms of the governing agreement, *see Transport*, 183 F.3d at 628; *Joe McClelland*, 23 F.3d at 1257-58, Kroger may not rely on a practice — even one accepted by the Union — that contravenes the express and unambiguous terms of the CBA. Whatever meaning Kroger and the Union may have ascribed to "part-time" in the Local Supplement, Kroger's practice of treating the employees in question as "casuals" for pension contribution purposes when, in fact, those employees were not hired on a short-term basis or employed from time to time cannot thwart the unambiguous definition of casual employees contained in the CBA.

The district court acknowledged that its task on remand was a difficult one given the fact that the CBA, "as interpreted by the local representatives of the union and by the company, is marked by an inconsistent view of casual and part-time as between the two portions of the agreement." Tr. 8-B at 1007. Nevertheless, because the employees were not truly casuals, they had to have been probationary employees, the only other type of new employee countenanced by the CBA. And because they were probationary employees, and not casuals, Kroger should have made the disputed pension contributions for them.

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[3] *See Old Colony Trust Co. v. City of Omaha*, 230 U.S. 100, 118 (1913) ("Generally speaking, the practical interpretation of a contract by the parties to it for any considerable period of time before it comes to be the subject of controversy is deemed of great, if not controlling, influence."); *Moriarty*, 164 F.3d at 332 (stating that extrinsic evidence of the parties' understanding of an ambiguous term is "highly relevant"); *In re Teamsters*, 989 F.2d at 137 (stating that evidence of a course of conduct over a substantial period of time is "particularly compelling" on the question of the parties' intent).

C.

Kroger also submits that the Fund should be estopped from claiming that pension contributions are owed for the Atlanta workers. According to Kroger, it can establish the elements of estoppel because it reasonably relied, to its detriment, on a knowing misrepresentation because the Fund did not object to Kroger's practice of deeming all new hires as casuals.

Kroger argues that the Fund made knowing misrepresentations to it in two ways. First, Kroger claims, the Fund knowingly misrepresented to it that the Fund did not object to the company's practice. According to Kroger, each month it sent the Fund a report that showed the gap between the employees' original hire dates and the dates Kroger began making contributions for them. The Fund then sent Kroger a monthly bill for fund contributions based on the information provided by Kroger the previous month. By "misrepresenting to Kroger that Kroger's payment and reporting was acceptable," Kroger argues, it was misled into thinking that no pension contributions were required. Appellant's Br. at 42. Secondly, Kroger argues that, by accepting Kroger's monthly contributions, the Fund knowingly misrepresented to Kroger that the Fund had read and had approved the CBA. Had the Fund read the CBA, according to Kroger, the Fund would have known that the CBA was ambiguous (as it did when it finally conducted its audit) and would have asked Kroger about the ambiguity.

Moreover, Kroger submits that it reasonably relied on the Fund's misrepresentations. Essentially, Kroger explains, the Fund's inaction "lulled Kroger into a false sense of security regarding its use of part-timers and its contribution obligations." Appellant's Br. at 44. Finally, Kroger maintains that it relied to its detriment on the Fund's misrepresentations. According to Kroger, had it not relied on the misrepresentations, Kroger would not have incurred the expense and exposure caused by the present litigation.

The district court held that our decision in *Coker v. Trans World Airlines, Inc.*, 165 F.3d 579 (7th Cir. 1999), precluded relief on an estoppel theory in this case because, under *Coker*, estoppel requires a "knowing misrepresentation." R.197 at 4 (citing *Coker*, 165 F.3d at 585-86). According to the district court, the Fund had not made a knowing misrepresentation because such a misrepresentation requires an intent to mislead. In this case, the district court explained, "nothing like that occurred." *Id.*

This circuit has not decided whether estoppel claims should be available in ERISA actions involving multi-employer, funded plans. *See, e.g., Shields v. Local 705, Int'l Bhd. of Teamsters Pension Plan*, 188 F.3d 895, 899-900 (7th Cir. 1999) (declining to decide whether estoppel could ever apply to such a plan). Even assuming that estoppel could be available in this context, however, we agree with the district court that Kroger cannot make out the elements of estoppel, although we reach this conclusion for reasons different from the district court. Kroger's estoppel argument is foreclosed because Kroger's reliance on any misrepresentation made by the Fund could not have been reasonable. "Reliance on the misrepresentation is reasonable only if the party asserting estoppel does not or should not know the truth." *Bakery & Confectionary Union & Indus. Int'l Pension Fund v. Ralph's Grocery Co.*, 118 F.3d 1018, 1027 (4th Cir. 1997). Here, Kroger, the party asserting estoppel, obviously knew of its practice of designating the employees in question as casuals and, therefore, it was in a better position than the Fund to know the truth that its practice did not comport with the CBA. Thus, we cannot accept Kroger's estoppel argument.

D.

Finally, we must address the question of attorneys' fees and costs. The district court correctly awarded the Fund its attorneys' fees and costs for its efforts in the district court to enforce the contribution agreement with Kroger. *See* 29 U.S.C. § 1132(g)(2). Likewise, the Fund is entitled under § 1132(g)(2) to recover its

reasonable attorneys' fees and costs in this appeal. *See, e.g., Central States, Southeast & Southwest Areas Pension Fund v. Wintz*, 155 F.3d 868, 876 (7th Cir. 1998); *Joe McClelland*, 23 F.3d at 1259.

Conclusion

For the foregoing reasons, we affirm the judgment of the district court.

AFFIRMED

A true Copy:

Teste:

_____

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

In the
United States Court of Appeals
for the Seventh Circuit
Chicago, Illinois 60604

February 2, 2001

Before

Hon. HARLINGTON WOOD, JR., *Circuit Judge*

Hon. JOHN L. COFFEY, *Circuit Judge*

Hon. KENNETH F. RIPPLE, *Circuit Judge*

Nos. 99-2257 & 99-3014

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, and HOWARD McDOUGALL, *Plaintiffs-Appellees,*	) Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
	) No. 93 C 3669
KROGER COMPANY, *Defendant-Appellant.*	) John F. Grady, *Judge*

ORDER

The court, on its own motion, corrects an error in the text of the original opinion. *See Central States, Area Pension Fund v. Kroger, 226 F.3d 903 (7th Cir. 2000).* On page 910 of the published opinion, column 2, line 6, the term "de novo"ought to read "deferentially." As the remainder of the court's discussion makes clear, the correct standard was applied in the opinion and this slip of the pen did not impact the court's analysis or the result in the case.

APPENDIX C

In the
United States Court of Appeals
for the Seventh Circuit
Chicago, Illinois 60604

November 16, 2000

Before

Hon. HARLINGTON WOOD, JR., *Circuit Judge*

Hon. JOHN L. COFFEY, *Circuit Judge*

Hon. KENNETH F. RIPPLE, *Circuit Judge*

Nos. 99-2257 & 99-3014

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, and HOWARD McDOUGALL, *Plaintiffs-Appellees,*	) Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
KROGER COMPANY, *Defendant-Appellant.*	) No. 93 C 3669) John F. Grady, *Judge*

ORDER

Upon consideration of the Defendant-Appellant's petition for rehearing *en banc*, filed on September 29, 2000, no judge in active service has requested a vote thereon and the judges on the original panel have voted to deny the petition. Accordingly,

IT IS ORDERED that the petition for rehearing *en banc* is hereby DENIED.

APPENDIX D

93-3669.991 April 8, 1999

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, and HOWARD McDOUGALL,	)
Plaintiffs,	) No. 93 C 3669
KROGER COMPANY,	) John F. Grady, *Judge*
Defendant.	)

DECISION ON LIABILITY

The summary judgment entered by this court in favor of the defendant Kroger was reversed by the Court of Appeals and the case was remanded for a determination of the meaning of the ambiguous term "part-time." *Central States Pension Fund v. Kroger, Co.*, 73 F.3d 727, 733 (7th Cir. 1996). We conducted an evidentiary hearing for that purpose and entertained post-hearing briefs and proposed findings of fact from the parties. We are now prepared to make the ruling mandated by the Seventh Circuit.

The Court of Appeals made it clear that

> . . . it is only if the employees at issue are truly casual, and not probationary, as those terms were understood by the parties to the CBA, that Kroger's reclassification of the Atlanta employees (and thus its

> failure to make contributions on their behalf) is permissible.

Id. at 733. The starting point of our analysis, then, is to consider whether the evidence shows the Atlanta warehouse employees in question were treated as "casual" by the company and the union as that term is used in the Collective Bargaining Agreement ("CBA"). The term is used only in the master portion, and not the local portion of the agreement, but that is immaterial in view of the holding of the Court of Appeals that the two components constitute "a single, unitary contract; they must be read in this manner." *Id.* at 731.

What the parties understandably have tried to do, in light of our assignment on remand, is to prove that the term "part-time," (which was used in the local agreement and not in the master agreement) was understood by the company and the union to be either synonymous with, or not synonymous with, "casual" as used in the master agreement. These efforts have been largely unpersuasive. The fact is that the local union and company representatives acted according to their own lights, with little or no regard to whether their mutual understanding of whom would be paid fringe benefits comported with the terms of the master agreement. If the matter had been left to the local union representatives, no question of contributions for these employees would ever have arisen. It was not until a new set of auditors at the Fund took a look at these employees in 1991 that someone raised a question that resulted in this claim. The union and company witnesses have attempted reenactments that are contrary to the way they acted at the time. As an example, at least one of the company witnesses testified that a phrase commonly used to describe these workers at the Atlanta warehouse was "part-time casual." We did not find this testimony credible. The employees would have been described as "part-time," or "casual," but not both.

The findings of fact we made at the conclusion of the evidentiary hearing on December 21, 1998, are largely dispositive of the liability aspect of the case. We found

> First, the employees in question were not "hired on a short-term basis," nor were they "employed from time to time," as defined in article 2.3 of the master portion of the collective bargaining agreement.

Tr. at 1005. Thus, the employees were not "casual" employees within the meaning of the CBA, and this alone should entitle plaintiffs to prevail in view of the Seventh Circuit's holding that defendant's failure to make contributions is permissible ". . . only if the employees at issue are truly casual, and not probationary, as those terms were understood by the parties to the CBA . . . ." 73 F.3d at 733.

The second finding we made on December 21, grew out of the first finding:

> My second finding of fact is based upon the first one. It is that the phrase "part-time" in the local portion of the agreement is not the same as and does not mean "casual" as defined in article 2.3 of the master portion of the agreement.

Tr. at 1005.

We were not sure where these findings left us, in light of the possibility that the conduct of the Fund might somehow have given rise to an estoppel to claim contributions on behalf of these employees. Our concern had to do primarily with the silence of the Fund over the long period of time involved.

Our question about estoppel has been answered by the decision of the Seventh Circuit in the case of *Coker v. Trans World Airlines, Inc.*, 165 F.3d 585-86 (7th Cir. 1999), which holds that for an estoppel under ERISA there must be a "knowing misrepresentation," which is to say that there must be an intent to mislead. Nothing like that occurred here. At most, the Fund was negligent. That cannot support an estoppel argument.

What remains to be decided is the significance of the third and fourth findings of fact we made at the conclusion of the hearing:

> My third finding of fact is that the local union representatives and the [company] negotiators acquiesced in the treatment of all new hires as "part-timers" not entitled to pension and welfare contributions from at least 1997 [sic] through the end of the audit period and beyond. These employees were told by management that they would not be [en]titled to contributions until they had successfully bid for regular employment and had been placed on the regular seniority list. The employees fully understood that. Tr. 1005-06.
>
> My fourth finding of fact is that the term "part-time" in the local portion of the agreement was interpreted by the company and the local union representatives as referring to these employees who had not been placed on the regular seniority list and who, by reason of that fact, would not be eligible for benefit contributions, regardless of the length of time they had been employed by the company. (Tr. 1006)

These "local" understandings cannot prevail against the definition of "probationary" employees contained in Article 2.2 of the master agreement. Because the employees were not "casual," they were necessarily "probationary," and therefore entitled to fringe benefits. They were, in the formulation of the Court of Appeals, regular employees who worked a shorter week. 73 F.3d at 732, 733. (In fact, they often worked a full week, but in no event were they "casual" employees under the definition in the master agreement).

CONCLUSION

We therefore find that plaintiff is entitled to recover fringe benefit contributions for the employees in question at the Atlanta warehouse for the relevant periods.

Before a final judgment can be entered it will be necessary to determine the amount of those contributions. The court is not clear what further proceedings will be necessary to determine the proper amount, and a status conference will be held on Tuesday, April 13, 1999 at 9:45 to set whatever schedule is necessary.

DATE: April 8, 1999

ENTER: /s/ John F. Grady
John F. Grady, United States District Judge

APPENDIX E

93-3669.981-MEV March 13, 1998

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, and HOWARD McDOUGALL,	)
Plaintiffs,	) No. 93 C 3669
KROGER COMPANY,	) John F. Grady, *Judge*
Defendant.	)

MEMORANDUM OPINION

Plaintiffs brought a claim under the Employee Retirement Income Security Act ("ERISA") seeking pension contributions from defendant. Before the court are the parties' cross-motions for summary judgment pursuant to Federal Rule of Civil Procedure 56. For the reasons set forth below, both motions are denied.

BACKGROUND

The background facts were fully set forth in our previous opinion, *Central States, Southeast and Southwest Areas Pension Fund et al., v. The Kroger Co.*, 1995 WL 135571 at *1 (N.D. Ill. March 22, 1995).

The Kroger Company ("Kroger") operates a number of grocery stores throughout the country and has a distribution and warehouse facility in Atlanta (the "Atlanta Center").

Since 1971, Kroger has been a party to a Participation Agreement with the Central States, Southeast and Southwest Areas Pension Fund ("Central States" or "the Fund") whereby Kroger agreed to contribute to the Fund on behalf of its employees pursuant to various collective bargaining agreements ("CBAs") with local chapters of the International Brotherhood of Teamsters. Kroger executed a series of CBAs with the Local 528 chapter of the Teamsters ("Local 528"), which represents the truckdrivers and warehouse employees at the Atlanta Center. In each of these CBAs, Kroger agreed to be bound by the terms of the Fund's Trust Agreement.

The CBAs with Local 528 consisted of two parts, a Master Agreement, which was negotiated by Kroger and the Teamsters periodically and which contained provisions common to several of Kroger's facilities nationwide, and a Local Agreement, which contained provisions applicable solely to the bargaining unit employees at the Atlanta Center.

The master portions of the CBAs for the period at issue in this case (December 28, 1986, through December 30, 1989) distinguished between two types of employees: "probationary" employees and "casual" employees. Although Kroger was required by the CBA to make payments to the Fund for all of its probationary employees who had been working for more than 30 days and were on the regular seniority list, it did not have to contribute on behalf of its "casual" laborers.

Since about 1977, the Atlanta Center has had a practice of designating all newly hired warehouse employees as "casual" employees. "Casual" employees in the Atlanta Center were also referred to at that facility as "part-time" employees. Many of these "casual" or "part-time" workers eventually obtained regular positions. But during the time

they were designated as "casuals" or "part-timers," Kroger made no contributions on their behalf to the Fund. They were not listed on the regular seniority list for the Atlanta Center until they actually became regular employees.

In 1991, Central States conducted an audit, as authorized by its Trust Agreement, examining the records of employee work history at the Atlanta Center. The Fund concluded that contributions were due on behalf of all warehouse employees from the 30th day of their employment, regardless of whether they had been designated by Kroger as regular or casual employees. Kroger disagreed, and Central States filed this action under 29 U.S.C. §§ 1132 and 1145, alleging that Kroger had violated the Trust Agreement and ERISA by failing to accurately report the work histories for these warehouse employees for the period between December 28, 1986, and December 30, 1989, and that Kroger owed contributions to the Fund in excess of $200,000.00. Complaint, ¶¶ 19-20. The parties have submitted cross-motions for summary judgment under Rule 56(c) of the Federal Rules of Civil Procedure, each asserting that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law.

Id. On March 22, 1995 we granted Kroger's motion for summary judgment. We reasoned that the term "part time" as used by Kroger and in the Local Supplement was equivalent to the term "casual" as used in the Master Agreement, and concluded that the part-time employees at issue were truly casual employees for whom no contributions were due. *Id.* at 8. The Seventh Circuit reversed. *Central States, Southeast and Southwest Areas Pension Fund, et al., v. The Kroger Co.*, 73 F.3d 727 (7th Cir. 1996). In so doing, the Court explained that it was erroneous to read the Master Agreement and the Local Supplement as two separate agreements. Since the Local Supplement was meant to be incorporated into the Master Agreement, the two parts form a single unitary document. As

such, it concluded that the term "part-time" was susceptible to more than one reasonable meaning: "[p]art-time could mean casual or it could refer to a regular employee who works a shorter week." The court determined that the CBA is ambiguous in this respect, and a fact-finder should determine the meaning of "part-time." *Id.* at 732-733 (citing *Jos. Schlitz Brewing Co. v. Milwaukee Brewery Workers' Pension Plan,* 3 F.3d 994, 999 (7th Cir. 1993), *aff'd*, 513 U.S. 414 (1995)).

On remand, both parties again filed cross motions for summary judgment. Defendant argues that any ambiguity that results from the two parts of the CBA being read together "can be reconciled by the undisputed extrinsic evidence of [Kroger and the union's] intent." This evidence compels the conclusion that the parties to the CBA intended that the employees were "casuals" for whom no pension contributions were due. Plaintiffs make two arguments in support of their motion for summary judgment: (1) Kroger never had authorization to hire casual employees in 1977, so all of the employees at issue were probationary employees who gained full-time regular status after 30 days on the job, and (2) the facts show that the employees at issue were not truly casual.

Before exploring the merits of the arguments, it is important to note and keep in mind that although plaintiffs were not parties to the CBA between the union and Kroger, it is the CBA that defines Kroger's obligations to the plaintiffs. *Id.* at 730-31 (citing § 515 of ERISA[1] and *Central States, Southeast*

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[1] ERISA § 515 states:

> Every employer who is obligated to make contributions to a multiemployer plan under the terms of the plan or under the terms of a collectively bargained agreement shall, to the extent not inconsistent with law, make such contributions in accordance with the terms and conditions of such plan or agreement.

29 U.S.C. § 1145.

& Southwest Areas Pension Fund v. McClelland, Inc., 23 F.3d 1256, 1258 (7th Cir. 1994)). Therefore, it is not the intentions of the plaintiffs, but the terms of the CBA and the way those terms were understood by the union and Kroger that govern the plaintiffs' claims. *Id.* at 731, 733.

DISCUSSION

Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). In considering such a motion, the court construes the evidence and all inferences that reasonably can be drawn therefrom in the light most favorable to the nonmoving party. *O'Connor v. DePaul University*, 123 F.3d 665, 669 (7th Cir. 1997). "A dispute over material facts is genuine if 'the evidence is such that a reasonable jury could return a verdict for the nonmoving party.'" *Kennedy v. Children's Serv. Soc'y of Wis.*, 17 F.3d 980, 983 (7th Cir. 1994) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). The court will enter summary judgment against a party who does not "come forward with evidence that would reasonably permit the finder of fact to find in [plaintiff's] favor on a material question." *McGrath v. Gillis*, 44 F.3d 567, 569 (7th Cir. 1995).

Once the moving party has supported its motion for summary judgment, the "adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in [Rule 56], must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). Any fact asserted in the movant's affidavit will be accepted by the court as true unless the adverse party submits its own affidavits or other documentary evidence contradicting the assertion. *Curtis v. Bembenek*, 48 F.3d 281, 287 (7th Cir. 1995). If the

adverse party does not respond with documentary evidence complying with Rule 56, "summary judgment, if appropriate, shall be entered against the adverse party." Fed. R. Civ. P. 56(e).

I. Defendant's Argument for Summary Judgment

Defendant argues that this court should grant summary judgment because "any ambiguity that results from the two parts of the CBA being read together can be reconciled by the undisputed extrinsic evidence of the parties' intent."[2] Defendant's Motion for Summary Judgment, at 6. Undisputed extrinsic evidence, defendant argues, reveals that Kroger and the union intended to make no pension contributions for the employees at issue.

Whether a contract is ambiguous is a question of law for the court to decide. *Illinois Conference of Teamsters & Employers Welfare Fund v. Mrowicki,* 44 F.3d 451, 459 (7th Cir. 1994). If the court determines that the contract is not ambiguous, then interpretation of the contract is a question of law, *Echo, Inc. v. Whitson Co., Inc.,* 121 F.3d 1099, 1104 (7th Cir. 1997), and the court may not consider extrinsic evidence. *Independent Constr. Equip. Union v. Hyster-Yale Materials Handling, Inc.,* 83 F.3d 930, 933 (7th Cir. 1996). On the other hand, when a contract is ambiguous, the court sends questions of interpretation to the trier of fact. *Jos. Schlitz Brewing,* 3 F.3d at 999 (citing *Resolution Trust Corp. v. M & L Investments,* 984 F.2d 190, 193 (7th Cir. 1993)). In that event, use of extrinsic evidence for

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[2] We note that the ambiguity to which defendant refers must be the word "part-time." Defendant's Memorandum in Support of its Motion for Summary Judgment ("Defendant's Motion for Summary Judgment"), at 6. This is clear because in the preceding sentence, defendant stated that no ambiguity exists if the two parts to the CBA are read separately, as this court held in March of 1995 when it found that "part-time" meant "casual." More fundamentally, that is the only ambiguity the Seventh Circuit found in the CBA, and thus the only ambiguity to which defendant could be referring.

interpretation is proper, but again, resolution of the ambiguity is a question of fact. *Press Machinery Corp. v. Smith R.P.M. Corp.*, 727 F.2d 781, 784 (8th Cir. 1984). There is a caveat to this principle: interpretation of an ambiguous contract is a question of law for the court to decide "as long as the extrinsic evidence bearing on the interpretation is undisputed." *Baker v. America's Mortg. Servicing, Inc.*, 58 F.3d 321, 326 (7th Cir. 1995); *see also Weeks v. Samsung Heavy Indus. Co., Ltd.*, 126 F.3d 926, 933-34 (7th Cir. 1997) (stating that unless no genuine dispute exists, courts must be careful not to invade the province of the fact-finder by resolving issues of intent).

Here, the Seventh Circuit held that the CBA is ambiguous and stated specifically that "the matter must be returned to the finder of fact for a determination of the meaning of part-time." *Kroger*, 73 F.3d at 733. Nevertheless, defendant urges us to "reconcile" any ambiguity by examining the parties' intentions. All of the factors defendant urges us to consider regarding their intentions — knowledge and assent by the union, resolution of a grievance in 1991, and defendant's long standing practices — are extrinsic to the CBA. Although these factors are legitimate factual considerations, defendant cannot hope to obtain summary judgment unless the evidence is undisputed. *See Baker*, 58 F.2d at 326. Here, the evidence is disputed, so the ambiguity remains a factual question to be resolved by the finder of fact.

Defendant argues, among other things, that a grievance proceeding and decision in 1991 conclusively shows that the parties intended the employees at issue to be casual. The grievance was filed to protest the lack of pension benefit contributions being made on behalf of part-time employees at the Atlanta facility. The grievance committee, made up of a union representative and a Kroger representative, denied the grievance. The decision itself does not elaborate on the reasons for the denial, but the employer's representative who heard the grievance, Victor Horn, testified that he concluded the

employees were casual because of the language of the contract and the parties' "administration of the contract." *See* Horn Deposition, at 61-62, 66 (noting that until 1991 the parties had no disagreement about the pension contributions). Because the decision is binding on the union and the employer, defendant argues that this is conclusive evidence of the parties' intent.

Elaborating on Horn's explanation, defendant argues that the union knew that there were casual employees at the Atlanta facility for whom no pension contributions were being made. First, regular seniority lists named each individual who was a full-time regular employee on whom pension benefit contributions were to be made. The employees at issue were not on the regular seniority lists (although they were on a part-time seniority list), and the union regularly received print-outs reflecting this practice. Indeed, the print-outs listed the date of hire and the date on which pension contributions commenced. Second, Lab Phillips, a shop steward and union negotiator, testified in his deposition that sometime before 1985, warehouse employees told him that no pension contributions had been made on their behalf. Phillips Deposition, at 17-18. Third, two employees also testified that they understood they would not be on the regular seniority list until they were full-time employees. Butler Deposition at 13; Davis Deposition at 10. Despite the information available to it, the union did not protest the lack of contributions until 1991. Defendant argues that this shows the union acquiesced in this practice and intended the employees at issue be treated as "casuals."

This evidence is disputed by the plaintiffs, who point to the deposition testimony of Robert Jerry Cook, the president of Local 528 between 1981 and 1994. At his deposition, Cook stated that to his knowledge "Local 528 never agreed to hire casual employees at Kroger." Cook Deposition, at 21. While he knew that there were part-time employees at Kroger, he stated that to his knowledge, "there was never any casual employees at Kroger," *id.* at 32, and he denied having heard the

terms used interchangeably. *Id.* at 32-33. He also testified that with regard to the part-time employees, he was "under the impression that they received all their pension credits" and didn't find out until the 1991 grievance was filed that Kroger was not paying pension benefits on part-time employees. *Id.* at 51.

Defendant argues that Cook's testimony is not credible because the union received the regular seniority lists and could see that the part-time employees were not on that list, and hence, were casual employees. However, issues of credibility cannot be resolved on a motion for summary judgment. *Wolf v. Buss (Am.) Inc.*, 77 F.3d 914, 922 (7th Cir.), *cert. denied*, 519 U.S. 866 (1996) (stating that judging credibility is for the jury); *Sarsha v. Sears, Roebuck & Co.*, 3 F.3d 1035, 1041 (7th Cir. 1993). Therefore, Cook's statements are sufficient to preclude this court from finding as a matter of law that the union intended the employees at issue to be "casual." The decision of the grievance committee is not conclusive evidence of the parties' intent because it is barren of any mention of the parties' intent, or indeed any of the facts relied on by the committee to deny the grievance. Moreover, the decision represents a resolution of a dispute several years after the practice began, rather than a concurrent statement by the parties to the CBA as to what they intended.

Viewed in the light most favorable to the plaintiff, a fact-finder could reasonably infer that the union did not know of the practice, much less intend that the workers would be treated as "casuals." Defendant's motion for summary judgment is denied.

II. Plaintiffs' Arguments for Summary Judgment

Plaintiffs argue they are entitled to summary judgment because Kroger never had authority to hire casual employees, so all of the employees at issue necessarily became regular

employees after they had worked for 30 days. Section 2.3 of the CBA allows Kroger to hire casual employees "in those installations where such has been the practice." But, "[b]efore employing casual employees in other locations, the Employer will discuss the need with the Union, and such must be agreed to by the Union." It is undisputed that prior to 1977 all the employees that Kroger hired at its Atlanta facility were hired as probationary, not casual employees. *See* Stipulated Statement of Material Facts As to Which There is No Genuine Issue, ¶ 11. In order to change this practice, then, Kroger had to get the union's agreement. Article 32 of the CBA further provided that:

> All oral understandings, agreements and/or past practices claimed to exist at the time of the execution of the Agreement by the Local Union involved shall be reduced to writing, signed by the parties hereto and made a part of this Agreement within (6) months of said execution date or they will be deemed not to exist.

No writing executed between 1976 and 1992 evinces the union's agreement with Kroger's change in hiring practices. Therefore, plaintiffs argue, because the practice was not reduced to writing and made part of the agreement, it should be "deemed not to exist." Indeed, plaintiffs were entitled to rely on the absence of such a writing as indicating that casual employees were not being used and that Kroger would pay contributions on all of its employees. *See Central States, Southeast and Southwest Areas Pension Fund v. Gerber Truck Serv., Inc.*, 870 F.2d 1148, 1149 (7th Cir. 1989).

Defendant responds that while the agreement of the union was required, it was not necessary to create an additional writing evincing this agreement. First, defendant asserts that the union knew Kroger was hiring casual workers. The fact that the parties entered into successive CBAs every three years after 1977 — without modifying the existing language — shows that the parties believed the existing language in the CBA was

sufficient to cover the practice. Second, the CBA required Kroger to "discuss" the matter with the union, and it did not specify that a *written* agreement was necessary. Since other provisions of the CBA specifically required a writing and this one did not, the maxim of *expressio unius est exclusio alterius* instructs that no written agreement was necessary in this case. Indeed, the second sentence of Article 32 of the CBA contemplates the validity of oral agreements: "[a]ny disagreement between the parties as to oral understandings, agreements and/or prevailing practices will be referred to Step III of Section 8.1 for settlement." According to Step III, a grievance committee determined in 1991 that the parties' long-standing practice of treating these employees as "casual" meant that no pension contributions had to be paid on behalf of these employees.[3]

Ordinarily, employers cannot use oral agreements as a defense to a pension fund's claim for lack of contributions. *Central States, Southeast and Southwest Areas Pension Fund v. McClelland, Inc.*, 23 F.3d 1256, 1258 (7th Cir. 1994); *Gerber Truck*, 870 F.2d at 1149. The documents (i.e. Trust Agreements

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[3] However, the grievance committee's decision is not binding on the plaintiffs because they were not parties to the grievance procedure. *See American Fed. of Tele. and Radio Artists Health and Retirement Funds v. WCCO Television, Inc.*, 934 F.2d 987, 988-89 (8th Cir. 1991) (citing *Central States, Southeast & Pension Fund v. Central Transp., Inc.*, 472 U.S. 559, 575 (1985)). Moreover, the criteria the grievance committee used to resolve the union-employer dispute are not the same criteria used to determine plaintiffs' ERISA rights. *See Martin v. Garman Const. Co.*, 945 F.2d 1000, 1001-02 (7th Cir. 1991) (holding that the determination of the National Labor Relations Board that an employer was not liable under the labor laws did not preclude liability under ERISA). For example, plaintiff admits that the past practices of the parties was a valid defense to the union grievance that Kroger could assert. However, an employer's defense to a union grievances is not necessarily available as a defense to a pension fund's ERISA claim. *Gerber Truck*, 870 F.2d at 1149 (stating that § 515 of ERISA limits the defenses an employer can assert against a pension fund bringing a claim for lack of contributions); *see also Martin*, 945 F.2d at 1001-02 (stating that many of the traditional contract defenses "do not fly under ERISA").

and CBA's) on which funds rely must be strictly enforced. *Levit v. Ingersoll Rand Fin. Corp.*, 874 F.2d 1186, 1193 (7th Cir. 1989) (citing *Gerber Truck*). This is because, as the Seventh Circuit explained, pension funds are entitled to rely on the *writings* that establish the employer's obligations to them. *See Gerber Truck*, 870 F.2d at 1151 (pointing out that plans rely on the documents to determine the income they can expect to receive, which governs their determination of benefits). Therefore, defenses such as oral agreement to disregard the text and course of performance, among other things, cannot prevent the agreement, evidenced by the writings, from being enforced at the instance of the pension funds. *Id.* at 1153, 1154. Any less protection "may well saddle the plans with unfunded obligations." *Id.* at 1153.

However, "[e]xactitude works both ways. Just as pension and welfare plans get no less than the agreements provide, so they get no more." *Id.* Here, Article 32 of the CBA requires that a writing evince past practices. However, plaintiffs point to nothing in the CBA prior to 1976 evincing Kroger's past practice that all new employees at the Atlanta facility must be hired on a probationary status. It is plaintiffs, then, who rely on an unwritten past practice to establish their rights. *Cf. Gerber Truck*, 870 F.2d at 1149-50 (plaintiff relied on the written terms of the CBA, which the union and employer modified orally without notifying plaintiff). On the other hand, if defendant is correct that the CBA contemplates the validity of oral understandings, then no writing is necessary. But in that case, there is a question of fact as to whether Kroger and the union came to a valid understanding regarding new workers in 1977. Plaintiffs cannot have it both ways; they cannot insist that a writing is necessary as to one practice but not the other. Moreover, at the time in question (December of 1986 through December of 1989), the practice of employing only "casuals" at the Atlanta facility had been going on for about 10 years. Under the literal terms of the CBA, then, a past practice existed and

defendant was allowed to employ casual workers between 1986 and 1989.

We deny plaintiffs' motion for summary judgment on this ground.

The only way plaintiffs can obtain summary judgment, then, is to show that there is no dispute that the employees at issue were *truly* casual in nature. *See Kroger*, 73 F.3d at 733 (defining the issue on remand). The best way of determining what the parties understood "casual" and "probationary" to mean is to examine the definition supplied by the CBA.

> *Section 2.2 Probationary Employees.* A new employee shall work under the provisions of the Agreement but shall be employed only on a trial period of thirty (30) days during which period he may be discharged at the discretion of the Employer, provided, however, that the Employer may not discharge or discipline for the purpose of evading this Agreement or discriminating against Union members. After thirty (30) days the employee shall be placed on the regular seniority list.

Section 2.3 of the CBA defines casual employees as "those employees hired on a short term basis" who "may be employed from time to time." Also, "[c]asual employees shall not receive fringe benefits or accrue seniority and shall be limited to ten percent (10%) of the work force."

Plaintiffs argue that even if Kroger was allowed to use casuals, the employees at issue were not truly casual because they were not hired on a "short term" basis. Instead, these employees were hired with the expectation that they would become permanent employees. For example, after 1977, every employee whom Kroger classified as "regular" came from the pool of "casuals." Moreover, these "casual" employees were placed on a seniority list called the "Part-Time Seniority

Roster." This practice indicates an intent to keep the "casuals" on a long term basis. More importantly, because the Master Agreement of the CBA does not allow "casuals" to accrue seniority, this list is evidence that the employees at issue were not truly casual. Under the terms of the CBA, regular part-time employees and regular employees may accrue seniority, but not casual employees.

In response, defendant argues that although many "casuals" eventually became regular employees, many others did not. The possibility of becoming a regular employee was only that--a possibility. No one was guaranteed regular employment. On the contrary, argues defendant, the "casuals" understood that they did not have regular, permanent employment until they successfully bid on a full-time position and completed a probationary period. *See* Defendant's Motion for Summary Judgment, at 14 (citing the deposition testimony of Wilbert Butler, a Kroger employee). Two employees also testified that they understood they would not be on the *regular* seniority list until they were full-time employees. Butler Deposition at 13; Davis Deposition at 10. These employee were not guaranteed a 40 hour work week, they had no set hours, and worked only on an "as needed" basis. Unlike the regular employees, they did not have regular job assignments; they did the jobs no one else wanted. Furthermore, the fact that Kroger told these workers they would receive no fringe benefits, defendant argues, is further evidence that they were not entitled to fringe benefits such as pension contributions.

We are unpersuaded that the employees are, as a matter of law, truly casual employees as those terms were understood by the parties to the CBA. *See Kroger*, 73 F.3d at 733. Some facts suggest that the employees at issue did not meet the definition of "casual" under the CBA. For example, the fact that a "casual/part-timer" could accrue seniority is at odds with the Master Agreement's definition of a casual employee. On the other hand, in many other ways the employees at issue were

treated as short-term employees. They did not have fixed hours, their schedules were not guaranteed, and their employment had a definitive end if they could not make the jump to becoming regular employees. A court cannot choose between two competing inferences on a motion for summary judgment. *See Wolf,* 77 F.3d at 922 (quoting *Sahrsa,* 3 F.3d at 1041).

Because a fact-finder could reasonably infer that the employees at issue were truly "casual" as those terms were understood by Kroger and the union, we refuse to grant plaintiffs' motion for summary judgment.

CONCLUSION

For the foregoing reasons, defendant's motion for summary judgment is denied. Plaintiffs' motion for summary judgment is also denied.

DATED: March 13, 1998

ENTER: /s/ John F. Grady
John F. Grady, United States District Judge

APPENDIX F

In the
United States Court of Appeals
for the Seventh Circuit

No. 95-1936

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, and HOWARD McDOUGALL,

Plaintiffs-Appellants,

KROGER COMPANY,

Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 93 C 3669 - **John F. Grady**, *Judge*

ARGUED SEPTEMBER 28, 1995–DECIDED JANUARY 10, 1996

Before WOOD, JR., COFFEY and RIPPLE, *Circuit Judges.*

RIPPLE, *Circuit Judge*. Central States, Southeast and Southwest Areas Pension Fund ("the Fund" or "Central States") brought this action under § 515 of ERISA, 29 U.S.C. § 1145, against the Kroger Company ("Kroger"). The Fund claims that Kroger has not met its obligation to contribute to the Fund on behalf of certain Kroger employees. Kroger's obligation to make pension contributions is defined by the terms of the Collective Bargaining Agreement ("CBA") negotiated between Kroger and International Brotherhood of Teamsters Local 528. The district court examined the CBA and determined that, under its terms, Kroger was not obligated to make the pension contributions the Fund claimed were due. The district court, therefore, granted Kroger's motion for summary judgment. Central States appeals that judgment. For the reasons set forth in the following opinion, we reverse the judgment of the district court and remand the case for proceedings consistent with this opinion.

I
BACKGROUND

A. *Facts*

Kroger is a national grocery store chain. It operates a distribution and warehouse center in Atlanta. The warehouse employees and truck drivers who work at the Atlanta facility are represented by the Local 528 chapter of the International Brotherhood of Teamsters. Their employment relationship with Kroger is governed by a collective bargaining agreement. The CBA consists of two parts: first, a Master Agreement, which was negotiated by Kroger and the Teamsters and covers several facilities nationwide in addition to the Atlanta facility; second, a Local Supplement, which applies to the Atlanta facility alone.

The Master Agreement of the CBA describes, in addition to regular employees, two other types of employees: "probationary" and "casual." Probationary employees are defined as new employees who work on a trial basis for thirty to sixty days and may be discharged at the employer's discretion. After the trial

period ends, however, probationary employees become regular employees and "shall be placed on the regular seniority list." CBA § 2.2. Casual employees, in contrast, are "hired on a short-term basis." CBA § 2.3. They are permitted only at locations with a past practice of hiring casuals, and the total number of casuals is limited to ten percent of the work force. Most importantly, the CBA provides that casuals do not receive fringe benefits or accrue seniority. CBA § 2.3. Under the terms of the Master Agreement, Kroger was obligated to make pension contributions on behalf of all employees who had worked for thirty days or more and who had been placed on the regular seniority list. CBA § 31.1. The effect of this provision is that Kroger is required to make contribution to the Fund on behalf of all probationary employees who had completed their trial period, but not on behalf of casual employees.

The Local Supplement uses different terminology to describe the workers — a situation which the district court described as creating "confusion." Instead of the distinction between regular, probationary, and casual employees found in the Master Agreement, the Local Supplement refers to "full-time" and "part-time" employees. Neither of these terms is defined. However, two characteristics of part-time employment emerge from the Local Supplement. Part-time employees are permitted a limited form of seniority: They may accrue seniority "only among other part-time employees." CBA II.D.2. They also must follow certain job-bidding procedures. When a permanent job becomes available, the most senior part-timer must bid on the position. Failure to bid or to bid successfully results in termination from Kroger.

Prior to 1977, all newly hired warehouse employees were designated as probationary. In 1977, Kroger changed that designation and classified all newly hired warehouse employees as casuals. Many of the employees hired as casuals remained with Kroger for a lengthy period of time and eventually became regular employees; once an employee became a regular employee and was placed on the regular seniority list, Kroger made pension contributions on behalf of the employee to Central States.

However, as long as the employee was designated as a casual — often a period of several months[1] — no contribution was made.

In 1991, Central States audited the employment records at the Atlanta facility and concluded that those warehouse employees designated as casuals by Kroger were, despite their label, probationary employees. The Fund claimed that, for those warehouse employees (the "Atlanta employees"), Kroger should have made contribution after their thirtieth day of employment. Central States then brought this action against Kroger under 29 U.S.C. §§ 1132 and 1145, alleging that Kroger owed over $200,000 to the Fund for contributions that should have been made between December 28, 1986 and December 30, 1989. Both parties moved for summary judgment before the district court.

B. ***The Decision of the District Court***

The dispute before the district court was a straightforward one. Kroger took the position that it did not have to pay pension contributions on behalf of its Atlanta warehouse employees because they were casual employees. It equated the term "part-time" in the Local Supplement with the term "casual" in the Master Agreement. The district court therefore had to determine whether the Atlanta employees, termed casuals by Kroger, were in fact casuals, or were probationary employees who had been employed for more than thirty days and for whom pension contributions were required under the contract.

In its consideration of the parties' motions for summary judgment, the district court turned first to the Master Agreement. The court noted that the Agreement required Kroger to make contributions for regular employees, even part-time regular employees. The Agreement also made clear that only probationary employees, not casuals, could become regular employees at the end

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[1] Counsel for Kroger indicated to us at oral argument that he thought this period could range up to a maximum of six to eight months.

of their thirty-day probationary period. Although casual employees were to be hired on a "short-term basis," the Agreement did not specifically limit the duration of a casual employee's service.

In deciding the question before it, the court acknowledged at the outset that, in ordinary parlance, the terms "full-time" and "part-time" have a fixed meaning: Regular employees work the regular forty-hour work week; part-time employees work less. Nevertheless, the court determined that it ought not ascribe this usual meaning to the terms. Rather, the court determined that the term "part-time," as employed in the Local Supplement, unambiguously described the same employees as those described as casual in the Master Agreement.

The court acknowledged that, by interpreting the Local Supplement's use of part-time to mean casual, a conflict arose with the use of the term "part-time" in the Master Agreement. Although the court recognized that this conflict would create an ambiguity if the CBA were treated as one document, the court justified this conflict — part-time having two different meanings — on the ground that the CBA was a combination of two agreements and each agreement's use of the term was internally consistent. No ambiguity, therefore, resulted. Mem. Op. at 11, n.4.

Because the district court found that those employees designated as casuals by Kroger were treated as true casual employees (as defined by the CBA), the court granted summary judgment on behalf of Kroger.

II
DISCUSSION

This matter comes before us following the district court's grant of summary judgment on behalf of Kroger. Given this procedural posture, we review the district court's decision de novo. We shall affirm the summary judgment in Kroger's favor only if there is no genuine issue of material fact and Kroger is entitled to

judgment as a matter of law. *Krawczyk v. Harnischfeger Corp.*, 41 F.3d 276, 278 (7th Cir. 1994).

We begin our review with the statutory basis of the Fund's claim. Central States asserts its claim against Kroger under § 515 of ERISA. That statute provides:

> Every employer who is obligated to make contributions to a multiemployer plan under the terms of the plan or under the terms of a collectively bargained agreement shall, to the extent not inconsistent with law, make such contributions in accordance with the terms and conditions of such plan or such agreement.

29 U.S.C. § 1145. In our previous examinations of this statute, we have emphasized the centrality of the collective bargaining agreement in a § 515 claim. It is the "collective bargaining and contribution agreements [which] establish the employer's obligation to the pension fund." *Central States, Southeast & Southwest Areas Pension Fund v. McClelland, Inc.*, 23 F.3d 1256, 1258 (7th Cir. 1994). Section 515 gives pension funds, such as Central States, the right to "enforce the writings according to their terms." *Central States, Southeast & Southwest Areas Pension Fund v. Gerber Truck Serv., Inc.*, 870 F.2d 1148, 1149 (7th Cir. 1989) (en banc). A pension fund's reliance upon the terms of the CBA may not be thwarted by oral understandings between the employer and the union, *McClelland*, 23 F.3d at 1257-58, or by defenses that may defeat enforcement of the CBA between the employer and the union, *Gerber Truck*, 870 F.2d at 1153. We therefore focus initially on the CBA, the contract at the heart of the Fund's claim. When considering a contract in the context of an ERISA claim, federal common law rules of interpretation apply. *GCIU Employer Retirement Fund v. Chicago Tribune Co.*, 66 F.3d 862, 864 (7th Cir. 1995) (citing *Phillips v. Lincoln Nat'l Life Ins.*, 978 F.2d 302, 307 (7th Cir. 1992)).

We turn now to the CBA and consider first its structure. As we have already described at some length, the CBA is composed of two parts: a Master Agreement and a Local Supplement. In its review of the CBA, the district court recognized that, if the CBA were "simply one agreement," then there would be an ambiguity in the documentation because certain terms would have one meaning in the Master Agreement of the CBA and another meaning in the Local Supplement. This ambiguity did not result, in the view of the district court, because the CBA was really a combination of two agreements and the terms of one did not have to be harmonized with the terms of the other. When these agreements are viewed as distinct from each other, no ambiguity resulted; within each of the two parts, terms were used consistently.

We respectfully decline to accept the district court's conclusion with respect to the relationship between the two parts of the CBA. Rather than two agreements, the Master Agreement and the Local Supplement form a single, unitary contract; they must be read in this manner. This approach is necessary for two reasons. First, the Union and Kroger clearly set forth their intent that the Local Supplement be incorporated into the Master Agreement and be made a part of it. Article Thirty-Two of the Master Agreement, titled "Local Agreements and Practices," specifically states that:

> All oral understandings, agreements and/or past practices claimed to exist at the time of the execution of the Agreement by the Local Union involved shall be reduced to writing, signed by the parties hereto and *made a part of this Agreement* within six (6) months of said execution date or they will be deemed not to exist. . . .

CBA art. 32 (emphasis added). Clearly, this provision establishes that Kroger and the Union intended that the Local Supplement be incorporated into the Master Agreement. The distinction relied upon by the district court — that the CBA is two agreements, not one — is not supported by the plain text of the CBA. As we

discussed above, it is the plain text of the CBA upon which the Fund is entitled to rely.

Second, even if the CBA did not include an incorporation clause directing how the Local Supplement was to be considered in relation to the Master Agreement, we see no reason why we should depart from the basic rule that related documents must be read together. *See Murphy v. Keystone Steel & Wire Co.*, 61 F.3d 560, 565 (7th Cir. 1995).[2] The situation before us is quite similar to that in *Murphy*; the Master Agreement and the Local Supplement were executed at the same time by the same parties. Indeed, according to counsel's representation to us at oral argument, the Local Supplement was physically attached to the Master Agreement at the time the document was executed. The CBA as a whole contains only one signature block — following the Master Agreement and preceding the Local Supplement. Furthermore, as we already have noted, the Master Agreement expressly incorporates the Local Supplement by reference. Every indication surrounding the execution of the CBA points to the conclusion that the Union and Kroger intended the Master Agreement and the Local Supplement to comprise one agreement, and any consideration of the CBA must begin with the recognition that it is one contract we are examining — not two.

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[2] In *Murphy*, we rejected plaintiffs' contention that the CBA governing their working relationship with their employer should be read separately from their employee welfare benefits plan. Both the CBA and the benefits plan were negotiated by the same parties (the plaintiffs' union and their employer), they were executed at the same time, they were both supported by the same consideration, and the CBA expressly incorporated the plan by reference. *Id.* at 567 (citing *Lippo v. Mobil Oil Corp.*, 776 F.2d 706, 713 n.13 (7th Cir. 1985)). In *Lippo*, we determined that, although a franchise agreement was evidenced by five separate documents, because "they were executed at the same time between the same parties, for the same purpose and as parts of a single transaction," they were to be "read together and construed as a single contract." *Id.* at 713 n.13. (As in *Lippo*, the Master Agreement and the Local Supplement were executed at the same time by the same parties.)

Reading the entire CBA — the Master Agreement and the Local Supplement — as a totality, we turn to the language of the CBA itself and consider first whether it is ambiguous. Whether the CBA is ambiguous is a question of law that we review de novo. *Illinois Conference of Teamsters & Employers Welfare Fund v. Mrowicki*, 44 F.3d 451, 459 (7th Cir. 1994). The CBA is ambiguous if it is susceptible to more than one reasonable interpretation. *Brewer v. Protexall, Inc.*, 50 F.3d 453, 458 (7th Cir. 1995). If the CBA is unambiguous, this court may declare its meaning as a matter of law. If it is unclear, then questions of interpretation must be resolved by the trier of fact. *Jos. Schlitz Brewing Co. v. Milwaukee Brewery Workers' Pension Plan*, 3 F.3d 994, 999 (7th Cir. 1993), *aff'd* 115 S. Ct. 981 (1995).

Neither the Fund nor Central States argues before this court that the CBA is ambiguous; they agree that it is unambiguous, but disagree as to its interpretation. When parties suggest different, yet reasonable interpretations of a contract, the contract is ambiguous. *Murphy*, 61 F.3d at 565; *see also Rodriguez-Abreu v. Chase Manhattan Bank, N.A.*, 986 F.2d 580, 586 (1st Cir. 1993) ("Because the parties attribute reasonable but differing meanings to the term 'vested,' we find that the term is ambiguous. . . .").

When we examine the CBA as a single agreement, we conclude that the term "part-time" — a term central to the issue in this case — is susceptible to more than one reasonable meaning, thus rendering the CBA ambiguous. Part-time could mean casual or it could refer to a regular employee who works a shorter week. The first of these possible interpretations — that part-time is indeed another label for casual employment — finds some support in the CBA. For example, within the Local Supplement, there is a provision concerning "Hours, Overtime and Guarantees" for warehouse employees. Paragraph six of that provision states that "within a particular week, the number of part-time warehouse employees shall not exceed ten percent of the total number of warehouse employees." CBA II.A.6. In the Master Agreement, under the definition of casual employee, the number of casual

employees is also capped at ten percent of the work force. CBA § 2.3. It is not unreasonable, after viewing these two provisions together, to equate casual employees with part-time employees and to limit such employees to ten percent.

However, other considerations of the CBA support a contrary conclusion — that the term "part-time" does not refer to casual employment but simply has its customary meaning. According to the customary and usual meaning of the term, a part-time employee refers to an employee who works less than a regular work week; such employees are identifiable by the number of hours worked over a certain period. Additionally, several significant provisions of the Master Agreement suggest strongly that part-time ought not be equated with casual. First, casual employees, as defined in the Master Agreement, clearly are not entitled to receive fringe benefits or to accrue seniority, and no pension contributions are due on their behalf. However, the Master Agreement also appears to require contributions on behalf of regular part-time employees. Specifically, section 31.4 of the Master Agreement (under the heading "Pensions") states that "[c]ontributions to the Pension Fund must be made for each week on each regular or extra employee, *even though such employee may work only part-time under the provisions of this contract*. . . ." CBA § 31.4 (emphasis added). This provision appears to indicate that a regular employee who works a shorter week is a part-time employee and *is* eligible for pension payments. Here, part-time cannot possibly refer to a casual employee; casuals are not entitled to pension contributions.[3]

We therefore conclude that the CBA is ambiguous. Because of that ambiguity, the district court should not have treated the

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[3] Another section poses an ambiguity, at least at first glance. Section 2.3 of the Master Agreement provides that "[c]asual employees shall not . . . accrue seniority." Part II.D.2 of the Local Supplement, in contrast, provides that "[p]art-time employees . . . will be considered to have seniority only among other part-time employees." If, as the district court concluded, part-timers are casuals, then these two provisions may conflict: Casuals may not accrue seniority, and yet part-timers may.

CBA as unambiguous and should not have declared its meaning as a matter of law on summary judgment. Rather, the matter must be returned to the finder of fact for a determination of the meaning of part-time.

As we emphasized at the beginning of our discussion, the Fund is entitled to rely on the terms of the documents that define eligibility for benefits. Its right to contributions may not be thwarted by unilateral actions of the employer which contravene the terms of the collective bargaining agreement. *See McClelland*, 23 F.3d at 1258 ("No matter what an employer and local union agree orally, the collective bargaining and contribution agreements establish the employer's obligation to the pension fund. . . ."); *Gerber Truck*, 870 F.2d at 1149 ("The pension or welfare fund is like a holder in due course in commercial law, or like the receiver of a failed bank. . . .") (citations omitted). In this case, it is only if the employees at issue are truly casual, and not probationary, as those terms were understood by the parties to the CBA, that Kroger's reclassification of the Atlanta employees (and thus its failure to make contributions on their behalf) is permissible.

CONCLUSION

We therefore reverse the judgment of the district court and remand this matter to the district court for consideration consistent with this opinion.

REVERSED AND REMANDED

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX G

93-03669.951-EMG March 21, 1995

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, et al.,	)	
Plaintiffs,	)	No. 93 C 3669
THE KROGER COMPANY,	)	John F. Grady, *Judge*
Defendant.	)	

MEMORANDUM OPINION

Plaintiffs bring this claim for delinquent contributions under the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §§ 1132 and 1145. Plaintiffs and defendant have both moved for summary judgment under Rule 56(c) of the Federal Rules of Civil Procedure. For the reasons stated in this opinion, the court grants summary judgment in favor of the defendant.

BACKGROUND

The Kroger Company ("Kroger") operates a number of grocery stores throughout the country and has a distribution and warehouse facility in Atlanta (the "Atlanta Center"). Since 1971, Kroger has been a party to a Participation Agreement with the Central States, Southeast and Southwest Areas Pension Fund ("Central States" or "the Fund") whereby Kroger agreed to contribute to the Fund on behalf of its employees pursuant to various collective bargaining agreements ("CBAs") with local chapters of the International Brotherhood of Teamsters. Kroger

executed a series of CBAs with the Local 528 chapter of the Teamsters ("Local 528"), which represents the truckdrivers and warehouse employees at the Atlanta Center. In each of these CBAs, Kroger agreed to be bound by the terms of the Fund's Trust Agreement.

The CBAs with Local 528 consisted of two parts, a Master Agreement, which was negotiated by Kroger and the Teamsters periodically and which contained provisions common to several of Kroger's facilities nationwide, and a Local Agreement, which contained provisions applicable solely to the bargaining unit employees at the Atlanta Center.

The master portions of the CBAs for the period at issue in this case (December 28, 1986, through December 30, 1989) distinguished between two types of employees: "probationary" employees and "casual" employees. Although Kroger was required by the CBA to make payments to the Fund for all of its probationary employees who had been working for more than 30 days and were on the regular seniority list, it did not have to contribute on behalf of its "casual" laborers.

Since about 1977, the Atlanta Center has had a practice of designating all newly hired warehouse employees as "casual" employees. "Casual" employees in the Atlanta Center were also referred to at that facility as "part-time" employees. Many of these "casual" or "part-time" workers eventually obtained regular positions. But during the time they were designated as "casuals" or "part-timers," Kroger made no contributions on their behalf to the Fund. They were not listed on the regular seniority list for the Atlanta Center until they actually became regular employees.

In 1991, Central States conducted an audit, as authorized by its Trust Agreement, examining the records of employee work history at the Atlanta Center. The Fund concluded that contributions were due on behalf of all warehouse employees from the 30th day of their employment, regardless of whether they had been designated

by Kroger as regular or casual employees. Kroger disagreed, and Central States filed this action under 29 U.S.C. §§ 1132 and 1145, alleging that Kroger had violated the Trust Agreement and ERISA by failing to accurately report the work histories for these warehouse employees for the period between December 28, 1986, and December 30, 1989, and that Kroger owed contributions to the Fund in excess of $200,000.00. Complaint, ¶¶ 19-20. The parties have submitted cross-motions for summary judgment under Rule 56(c) of the Federal Rules of Civil Procedure, each asserting that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law.

DISCUSSION

Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). A "genuine issue of material fact exists only where 'there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party.'" *Dribeck Importers, Inc. v. G. Heileman Brewing Co.*, 883 F.2d 569, 573 (7th Cir. 1989) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986)).

Section 1145 of ERISA requires that every employer who is party to a CBA "shall, to the extent not inconsistent with law, make such contributions in accordance with the terms and conditions of such plan or such agreement." 29 U.S.C. § 1145. A pension fund is entitled to enforce the CBA as written. *Robbins v. Lynch*, 836 F.2d 330, 333 (7th Cir. 1988). An employer may not alter its obligations to the Fund under the CBA by oral understandings with the other party to the CBA. *Central States v. Gerber Truck Service, Inc.*, 870 F.2d 1148 (7th Cir. 1989); *Central States v. Joe McClelland, Inc.*, 23 F.3d 1256 (7th Cir. 1994). Therefore, the text of the relevant CBA is the principal source from which we

determine the extent of Kroger's obligation to Central States. We look to rules of contract interpretation for guidance. Contracts must be read as a whole, so that, if possible, all of the provisions are given effect. *Ryan v. Chromalloy American Corp.*, 877 F.2d 598, 604 (7th Cir. 1989) (citing *Musto v. American General*, 861 F.2d 897, 906 (6th Cir. 1988). Where the language is unambiguous, the court may as a matter of law declare its plain meaning. *Lumpkin v. Envirodyne Industries, Inc.*, 933 F.2d 449, 456 (7th Cir. 1991). Contract language is ambiguous if it is subject to more than one reasonable interpretation. *McNeilly v. Bankers United Life Assurance Co.*, 999 F.2d 1199, 1201 (7th Cir. 1993). A term which might appear ambiguous when viewed in isolation must be interpreted in the context of the entire contract. *Delta Mining Corp. v. Big Rivers Electric Corp.*, 18 F.3d 1398, 1403 (7th Cir. 1994). Although courts may ordinarily rely on the common usage of a term to define its meaning, a dictionary definition cannot override a clause in the contract defining a term in a particular way for the purpose at hand. *American Inter-Fidelity Exchange v. American Re-insurance Co.*, 17 F.3d 1018, 1022 (7th Cir. 1994).

The period in question spans two CBAs, the one in effect from September 1985 to September 1988, and the one in effect from July 1988 to September 1992. The relevant text in the two agreements is virtually identical. As indicated above, the Master Agreement portion makes a distinction between "probationary" employees and "casual" employees. Stipulated Statement of Material Facts, Exhibit D, p.3. Section 2.2 of the CBA describes a "probationary" employee as "a new employee" working under the provisions of the CBA. *Id.* Probationary employees work on a trial basis, and after 30 working days or 60 calendar days, whichever occurs first, the employee "shall be placed on the regular seniority list." *Id.*

Section 2.3 distinguishes between these probationary employees and "casual" employees. Casual employees are defined in this section as "those employees hired on a short-term basis." *Id.* It is further provided that Kroger may employ casual workers only at installations that have had a practice of hiring casual labor. *Id.*

"Casual employees shall not receive fringe benefits or accrue seniority and shall be limited to ten percent (10%) of the work force." *Id.* Although casual employees must be short-term hires, nowhere in the master portion of the CBA is a specific limit placed on the duration of their service.

Section 31.2 of the master portion states that Kroger will make a weekly contribution for each employee "who has been employed for thirty (30) days or more and is on the regular seniority list." *Id.* at 20. This indicates that an employee must meet both prerequisites before a contribution is required on his or her behalf. Only probationary employees are entitled to be placed on the regular seniority list when they have worked for 30 days. Casual employees may work for longer than 30 days without obtaining seniority. Therefore, only probationary employees who have completed their trial period and have become regular employees could meet the requirements for contribution under this section.

In Section 31.4, Kroger agrees to be bound by the terms of the Fund's Trust Agreement, and to make contributions "on each regular or extra employee, even though such employee may only work part-time under the provision of this contract. . . . Employees who work either temporarily or in cases of emergency under the terms of this contract shall not be covered by the provisions of this paragraph." *Id.* at 21. Thus, while Kroger must contribute on behalf of all employees working in regular positions, even part-time workers, it is not obligated to contribute for workers who are hired on a temporary or short-term basis. Under the CBA, casual workers are by definition short-term employees. Consequently, by the terms of its master agreement with the Teamsters, Kroger is not obligated to contribute to the Fund on behalf of its casual employees.

The text of the local portion of this CBA, however, causes some confusion. While the master portion makes distinctions between "probationary" and regular employees on the one hand and "temporary" and "casual" employees on the other, the local

portion refers to "full-time" and "part-time" employees. Nowhere in the CBA are these terms defined.[1] We must therefore determine their meaning both from their ordinary usage and from the context of their use in this agreement.

Ordinarily, the terms "full-time" and "part-time" refer to permanent, regular employees who either work forty or more hours a week ("full-time") or less than forty hours a week ("part-time").[2] From the use of these words in the context of the local portion of this CBA, however, we know the words have been assigned slightly different meanings.

The first clue that "part-time" and "full-time" might not have their usual meanings in the local portion is in the paragraph outlining how "permanent new jobs" or "permanent job vacancies" are filled. *Id.* at A-13. Permanent jobs are filled by "the employee having the most seniority[,] providing such employee has the necessary qualifications, experience and ability to perform the work." *Id.* Later in the paragraph, it provides that a "senior part-timer must take a full-time position when available or resign with no rights to recall. Part-timers who do not qualify on their full-time bid will be separated from the Company."[3] This language

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[1] Although the parties stipulate that the Atlanta Center used the terms "part-time" employee and "casual" employee interchangeably, because this is an unwritten practice it cannot adversely affect the rights of the Fund. *Central States v. Joe McClelland, Inc.*, 23 F.3d 1256 (7th Cir. 1994).

[2] According to WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY, "full time" is defined as "the amount of time considered the normal or standard amount for working during a given period." The term "part time" is defined as "involving or working less than customary or standard hours."

[3] This is the language in the CBA for 1985 to 1988. The subsequent CBA has substituted for this language the following: "Senior part-timer must take a full-time position when available or resign with no rights to recall. If he/she fails to qualify for the aforementioned full- time position, he/she will return to part-time status. These part-time employees will be allowed one (1) additional bid attempt before being separated from the Company." Stipulated

indicates that a part-time employee who does not eventually take a full-time position will be terminated. This is significant because, unlike the traditional concept of a part-time position, an employee in a "part-time" position under this agreement does not have indefinite tenure. "Part-time" status is short-term.

A second clue is provided by the clauses regarding the acquisition of seniority: On the one hand, the local agreement states, "No employee shall acquire any seniority rights until he has completed his probationary period (*see* Article 2, Section 2.2), and providing that after thirty (30) days full- time employment, the seniority beginning date is reverted to the last date of hire as a full-time employee." *Id.* at A-17. This means that where an employee takes a full-time job, any seniority he has previously acquired is lost, and his seniority is calculated from the first day of his employment as a full-timer. On the other hand, the seniority provision with respect to warehouse employees reads, "Part-time employees will not accrue seniority over full-time employees and will be considered to have seniority only among other part-time employees." *Id.* at A-14. If a "part-time" employee is understood to be a regular employee who works fewer than forty hours, these provisions are inconsistent. If both part-time and full-time employees are regular employees, they are both entitled to accrue seniority. Yet, if a full-time hire must abandon any seniority obtained as a part-time employee, then a new full-time employee who previously worked for a lengthy period as a part-timer could find himself with less seniority than a part-timer who has been at Kroger for just over a month.

A final clue regarding the definition of "part-time" is the following clause applying to warehouse employees: "It is understood that in a particular week, the number of part-time warehouse employees shall not exceed ten percent (10%) of the

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Statement of Material Facts, Exhibit E, p. A-14. This language provides a second chance for part- timers bidding on full-time positions but does not affect our analysis of the meaning of these terms in this dispute.

total number of warehouse employees." *Id.* at A-11. "Part-time" might have either of two meanings in this provision. Either part-time employees are different from casual employees, but like casual employees may not exceed 10 percent of the workforce, or part-time employees *are* casual employees and therefore subject to the 10 percent limitation.

All of the apparently inconsistent and unclear portions of the local part of the CBA are harmonized when the term "part-time" is considered synonymous with "casual." The provision regarding the termination of part-time employees becomes consistent with the requirement in the Master Agreement that a casual or "part-time" employee at the Atlanta Center may not work indefinitely in the casual status. That employee must either accept a permanent job or eventually be terminated. The provision that allows "part-time" or casual employees to obtain seniority with respect to each other does not conflict with the provision regarding reversion of the date of regular seniority to the date of full-time hire. Because casuals are never placed on the regular seniority list, they can never gain seniority over full-time employees.[4]

Where two interpretations of a contract term are possible, but only one yields a reasonable result, courts should adopt the interpretation that leads to the reasonable result. *See Licciardi v. Kropp forge Div. Employee's Retirement Plan*, 797 F. Supp. 1375, (N.D. Ill. 1992), *aff'd* 990 F.2d 979 (7th Cir. 1993); *Intern. Union,*

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[4] Central States does suggest that use of the term "part-time" as an equivalent for "casual" causes confusion when compared to the use of the term "part-time" in Section 31.4 of the Master Agreement. This might be true were there not two distinct portions of the CBA — Master portion and a Local portion which is attached to the Master Agreement as a "schedule." If this were simply one agreement, rather than a combination of two agreements, it would be a form of ambiguity for a single term to mean one thing when used in one portion and another when used in the other. However, in this instance, where there are two portions which are facially distinct, it is not anomalous for the two documents to employ terms in different ways, so long as the separate documents are internally consistent.

United Auto Workers v. Sundstrand Corp., 650 F. Supp. 83, 86, n.1 (N.D. Ill. 1986). Using this approach, we can construe the CBA requirements regarding the Atlanta Center warehouse employees. Ten percent of the warehouse employees may be "part-time" or "casual" employees. These employees are entitled to seniority as against each other, but are not permitted to accrue seniority as against the permanent or "full-time" hires. The most senior of these casual employees must bid on a full-time position when it is available. Should the casual employee fail to obtain the full-time position when eligible, the employee is terminated. Contributions are not made to Central States on behalf of these casual employees.

Central States' claim that Kroger owes contributions for these casual warehouse employees is not based on the actual text of the CBA, but on Kroger's admitted practice with respect to these employees. Kroger admits that starting in 1977, all of its new hires in the Atlanta Center warehouse were customarily designated "casual" employees. Stipulated Statement of Material Facts, ¶ 11. After a period as "casuals," usually exceeding 30 days, these employees would obtain regular positions and be eligible for benefits, including pension contributions. *Id.* at ¶ 19.

Central States argues that pursuant to the holding of *Gerber Truck*, 870 F.2d 1148 (7th Cir. 1989), Kroger may not use this unwritten practice to modify its obligation to the Fund. Plaintiff's Corrected Memo in Support of its Motion for Summary Judgment, p.8. *Gerber Truck* deals with instances where funds attempt to enforce the text of a CBA and employers attempt to use unwritten agreements or practices to alter the explicit meaning of the text.[5]

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[5] *Gerber Truck* stands for the proposition that pension funds are entitled to obtain all of the contributions allotted to them in the text of a collectively bargained agreement, and that employers may not use course of performance, formation defenses or other contract defenses, to alter the obligations laid out in the text. *Gerber Truck*, 870 F.2d at 1153 (quoting the House floor manager of the MPPAA with respect to this issue) ("Federal pension law must permit trustees of plans to recover delinquent contributions efficaciously, and without regard to issues which might arise under

In this instance, however, Kroger is not the one pointing to the unwritten practice; Central States is. The text is explicit: Kroger must make contributions for all of its regular employees but need not make contributions for its casual employees. Kroger did not make contributions for any of its warehouse employees while they were designated as casual employees. As far as the explicit text of the CBA is concerned, Kroger appears to have complied with its terms.

Central States claims that Kroger's practice indicates these Atlanta employees were not really "casual" laborers as defined in the CBA. It argues that these "casual" employees were permanent additions to Kroger's workforce and therefore cannot be excluded from Kroger's contribution obligations by arbitrarily designating them as "casual" laborers. The law requires that the Fund be able to discern Kroger's obligations from the text of the CBA,[6] and may presume that words are being given their ordinary usage unless the CBA or a written notification indicates otherwise. In *Central States v. Independent Fruit & Produce Co.*, 919 F.2d 1343 (8th Cir.

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labor-management relations law . . . [s]ound national pension policy demands that employers who enter into agreements providing for pension contributions not be permitted to repudiate their pension promises.").

[6] Courts recognize the importance of a pension funds' ability to determine without extrinsic information the true nature and extent of an employer's promise to contribute. "Funds must assume that all participants in a plan are following the stated terms; no other approach permits accurate actuarial computations and proper decisions about which claims to pay." *Robbins v. Lynch*, 836 F.2d 330, 333 (7th Cir. 1988). Multiemployer funds rely on actuarial tables to decide how much they need to collect now in order to meet all the demands for benefits expected in the future. Funds therefore maintain a set of rules, based on fostering actuarial soundness, and will often reject CBAs that do not comply with these rules. Among the practices that funds typically reject are practices that result in "adverse selection," a process by which only those most likely to vest for benefits have contributions made on their behalf. "Funds insist that members of a group be in or out as a bloc: the fund cannot cover the old and infirm at a rate computed from group averages while receiving nothing on behalf of younger employees." *Gerber Truck*, 870 F.2d at 1151-52.

1990), the Eighth Circuit held that where a CBA referred to "casual" laborers and the parties to the CBA had attached a special meaning to the word that was not communicated to the pension fund, the fund was entitled to rely upon the common meaning of the term "casual" in assessing the employer's liability.

The parties agree on a dictionary definition of "casual employment" which is derived from *Independent Fruit*: "Employment for uncertain or irregular times. Employment for short time and limited and temporary purpose. Occasional, irregular or incidental employment. Such employee does not normally receive seniority rights nor does he normally receive fringe benefits." 919 F.2d at 1350. Thus, the dictionary definition of the term "casual" requires that a true casual employee (1) will be employed only temporarily, (2) will be used on a limited basis, (3) will not keep standard hours, and (4) will not receive benefits or seniority. As discussed above, the text of the CBA is largely congruent with this definition of the nature of "casual employment." Casual employees at the Atlanta Center under the terms of the CBA were limited to 10 percent of the workforce, did not receive benefits, and although no specified limit was placed on the duration of their employment, the CBA did specify that a casual employee could not remain indefinitely without obtaining a permanent position.

At variance with this definition is the specification in the local portion of the CBA that casuals could acquire seniority. We find that this variance is not significant, first, because it is explicitly stated in the text. Because the local portion states explicitly that a casual employee is able to obtain a limited type of seniority, Central States was on notice that the Atlanta casual employee differed in this way from the usual definition. *See Central States v. Hartlage Truck Service, Inc*, 991 F.2d 1357 (7th Cir. 1993). Second, Kroger's seniority for its casual workers was applicable only against other casual employees and not against regular employees. That these employees could obtain an opportunity for permanent employment based on seniority among themselves does

not destroy the casual status of these employees. Even with that opportunity, these workers remained essentially temporary, limited purpose workers.

The undisputed facts as supported by the depositions and other materials indicate that the employees designated as "casuals" or "part-timers" by the Atlanta Center were consistently handled as true "casual" laborers within the meaning of the CBA. "Casuals" were not given regular work schedules until they received a permanent position. Deposition of Robert Peter Williams, p.36. "Casuals" were not placed on the regular seniority list. Stipulated Statement of Material Facts, ¶ 17. Kroger would terminate those casual employees who failed to obtain a full-time position. Deposition of Donald Payne, p.81. If the total number of casual laborers exceeded ten percent, Local 528 would notify management, and that number would be reduced. *Id.* at 105-06. Clearly, Kroger was entitled to have a number of casual employees under the terms of its CBA. The employees designated as "casual" or "part-time" employees at the Atlanta Center were treated in accordance with those terms.

Central States offers a sheaf of affidavits from workers at the Atlanta Center, many of whom never worked less than 40 hours in a week during their casual employment. *See e.g*, Affidavit of Jimmy Hill, ¶ 4. All of these affiants claim that they understood when they were hired that they were long- term employees. *Id.*, ¶ 2. Even Kroger officials admit that a casual employee who stayed at the Atlanta Center would eventually be eligible for a full-time position. Deposition of Donald Payne, p.56. However, there is a substantive difference between the possibility of an offer of permanent employment sometime in the future and being hired to a permanent position.[7]

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[7] Kroger, in essence, has offered an added benefit to its casual employees — he possibility of permanent employment. As we have indicated, this added benefit does not change the status of these employees as casual workers. Although Central States claims to raise an issue of fact with its assertion that

Finally, Central States makes an argument based on the fact that the CBA between Local 528 and Kroger for 1992 through 1996 contains slightly different terms from the CBAs at issue. The terms of the local portion of the new agreement explicitly state (1) that all new hires will be casual laborers and (2) that all part-timers who do not receive an offer for permanent employment within nine months of hire will automatically be designated as full-time employees and be eligible for benefits. Stipulated Statement of Material Facts, Exhibit F, p.A-18. This CBA, then, unlike prior ones, provides explicitly for the practice of hiring new employees as casuals. When this agreement was sent to Central States for approval, however, it was rejected as being inconsistent with the Fund's standards because the effect of the new provisions kept permanent employees from receiving benefits for nine months. *Id.*, Exhibit G.[8]

Despite Central States' argument regarding the current CBA, Kroger's practice with respect to the prior CBA was not in violation of the Fund's rules. Unlike Kroger's past practice and its prior CBAs, the 1992 agreement creates a new category of employees — "non-schedule full-timers." Stipulated Statement of Material Facts, Exhibit F, p.A-18. Non-schedule full-timers are

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no new employee received a written copy of the labor contract and that the employees believe they are permanent hires, we find this is not germane to the issue of whether or not Kroger really did maintain a separate category of employees called "casual employees." Plaintiff's Local Rule 12m Statement, ¶ 19. The language of the CBA clearly indicates a category of "part-time" or "casual" employees. More importantly, Kroger's internal recordkeeping system kept these two categories of employees distinct from the moment they were hired until the proper documents were filed with the payroll department indicating the casual employee had been given a permanent position. Stipulated Statement of Material facts, ¶¶ 11, 17; Deposition of Donald Payne, p.59-61.

[8] The Fund has a general rule that it will reject CBAs which do not establish an employer's obligation to pay benefits on each employee covered by the CBA who has been on the payroll for 30 days or more. This rule has been in effect since 1966. Affidavit of William Topel, Exhibit 1, p.24.

essentially casual laborers for whom there are no full-time positions available, but who are eligible for benefits because they have worked at Kroger for more than nine months. Under the prior arrangement, casual labor as an entire category was excluded from benefits. Under the 1992 CBA, some workers performing casual labor receive benefits, while others do not. This is adverse selection and is impermissible. *See Gerber Truck*, 870 F.2d at 1151- 52. Moreover, the group that is eligible to receive benefits does not receive them after 30 days, but after nine months, further violating the Fund's policies. Because there are substantive differences between the effects of the 1992 CBA and the effects of Kroger's practice from 1986 to 1989, the 1992 CBA is irrelevant to the issues in this case.

CONCLUSION

The CBAs at issue in this case clearly specified Kroger had no duty to contribute on behalf of casual employees as a category. Because the employees in question at the Atlanta Center were casual employees during the periods for which Central States alleges contributions are due, we deny plaintiffs' motion for summary judgment and will enter summary judgment in favor of the defendant.[9]

DATED: March 21, 1995

ENTER: /s/ John F. Grady
John F. Grady, United States District Judge

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[9] Kroger argues that Central States knew of Kroger's hiring practices and is therefore estopped from claiming contributions for the Atlanta employees. Because of our holding that the CBA does not require contributions for the Atlanta employees, we need not reach this argument.

(2)

Supreme Court, U.S.
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No. 00-1304

IN THE

Supreme Court of the United States

THE KROGER CO.,

Petitioner,

v.

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, AND HOWARD MCDOUGALL, TRUSTEE,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly determined that § 515 of ERISA precluded consideration of parol evidence offered by an employer to show an oral union-employer understanding that contradicted the unambiguous written labor contract setting forth the employer's written pension contribution commitment because the oral understanding was not disclosed to the pension fund.

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STATEMENT OF THE CASE

A. Relevant Contract Language.

Since 1967, the warehouse facility maintained by the Kroger Company ("Kroger") in Atlanta, Georgia (the "Atlanta Center") has been covered by a series of collective bargaining agreements between Kroger and Local 528 of the International Brotherhood of Teamsters ("Local 528"). These agreements consisted of a nationally negotiated master agreement that applied to the Atlanta Center as well as several other Kroger locations nationwide, and a local supplement negotiated by Kroger and Local 528 that applied solely at the Atlanta Center (the "CBAs"). Pet. App. 2a-3a. Kroger's participation in the Central States, Southeast and Southwest Areas Pension Fund ("Central States") began in 1971. Pet. App. 3a.

The master portion of the CBAs divided the covered workforce into three groups: casual employees, probationary employees and regular employees. Pet. App. 43a. A new hire could be either a casual or a probationary employee. See, Respondents' Appendix in the Court of Appeals ("CS Appl. App.") at 240-3, 266. The CBAs defined a probationary employee as "[a] new employee . . . work[ing] under the provisions of the Agreement . . . employed only on a trial period of thirty working days, not to exceed sixty (60) calendar days during which period he may be discharged at the discretion of the Employer." CS Appl. App. 189. "After the trial period ends . . . probationary employees become regular employees and 'shall be placed on the regular seniority list.' " Pet. App. 43a-44a Casual employees were defined as "[t]hose employees hired on a short-term basis [who] may be employed from time to time." CS Appl. App.189. "Most importantly, the CBA provides that casuals do not receive fringe benefits or accrue seniority." Pet. App. 44a.

The pension clause in the CBAs required Kroger to contribute to Central States a specified weekly amount "on behalf of all employees who had worked for thirty days or more and who had been placed on the seniority list." *Id.* "The effect of [the pension clause] is that Kroger is required to make contributions to [Central States] on behalf of all probationary employees who had completed their trial period, but not on behalf of casual employees." *Id.* The pension clause also stated that contributions were due on "each regular . . . employee, even though such employee may work only part-time under the provisions of this contract." CS Appl. App. 194. Thus, Kroger was required to contribute to Central States on both regular full-time and regular part-time employees. Pet. App. 4a, 16a.

The parties stipulated that prior to 1977, all newly hired warehouse employees were designated as probationary employees, so contributions were paid on behalf of every new hire after 30 days of employment. Pet. App. 5a, 44a; CS Appl App. 205; Trial Tr. 714-25. However, "[i]n 1977, Kroger changed that designation and classified all newly hired warehouse employees as casuals." Pet. App. 44a. As a result of the 1977 change, contributions were not paid on new hires until they qualified on a bid for one of the 13 distinct warehouse job classifications which typically took 6 to 9 months, not after 30 days of employment as had occurred prior to the change. Pet. App. 15a. This dramatic change occurred in the midst of the 1976-1979 collective bargaining agreement, yet there were no written amendments or modifications made to the CBA in 1977 or thereafter that reflected this change until shortly after Central States asserted its claim for additional contributions in 1991.[1] No one at Kroger knows anything about the circumstances surrounding

[1] The CBA signed in 1992 indicated that all new hires were part-timers and contributions were not owed on their behalf until they had worked 9 months. CS Appl. App. 209

the 1977 change. CS Appl. App. 122-124, 179-181, 184-186. The assertion in Kroger's petition that this dramatic change was made "with full disclosure to the respondent" is utterly false and unsupported by any finding by the district court or appellate court. In fact, Central States did not learn about the practice until the 1990 audit that precipitated this lawsuit.

B. The Decisions Below.

Early in the case, the parties filed cross-motions for summary judgment where each party argued that the CBAs were unambiguous and required judgment in their favor. Pet. App. 50a. The district court denied Central States' motion and granted Kroger's motion. However, the court of appeals reversed, holding that the district court had erroneously decided that it was unnecessary to try to reconcile the language of the local and master portions of the CBAs. Pet. App. 48a-50a. The court of appeals indicated that when the two agreements were read together as a unified contract, the term "part-time employee" was ambiguous because it could be synonymous with the term "casual employee" in which case no contributions were due, or it could mean a regular part-time employee in which case contributions were due. Pet. App. 50a. Because of the perceived ambiguity, the court remanded the case for a determination of the meaning of the term "part-time."

After a two week bench trial during which the district court received the testimony of over twenty witnesses and over three hundred exhibits, the district court ruled in Central States' favor. The district court recognized that the key to the case was whether the new hires were actually casual employees as Kroger claimed. Pet. App. 24a. If they were, the CBAs indicated they were not entitled to any fringe benefits, including the pension contributions sought by Central States. On the other hand, if they were not casual employees, they had to be probationary employees and should have been placed on the seniority list after 30 days at

which point Kroger was obligated to remit contributions on their behalf.

To resolve this issue, the district court focused on the actual relationship between Kroger and the new hires to determine if it was consistent with CBA language defining casual employees as "[t]hose employees hired on a short term basis [who] may be employed from time to time." CS Appl. App. 99-101. The district court concluded that the new hires were not covered by this definition because the evidence demonstrated that "the employees in question were hired by Kroger with the hope and expectation that they would become, each of them, full-time regular employees" and they were "continuously on hand to work part-time" so they were neither "short term" or hired from "time-to-time". Resp. App. 12a. The district court indicated that this finding was based upon evidence about the new hires "training and nurture," which included testimony of Kroger's management employees indicating the part-time employees were going through a "training period" and that it was inevitable they would become full-timers if they stayed with Kroger. Resp. App. 12a; CS Appl. App. 126-8. A manage-ment employee also testified that the high turnover of new hires was disappointing to Kroger because it was forced to continually invest significant time in training new hires, further demonstrating that Kroger sought a long-term relationship. Trial Transcript 539. The district court also relied upon "the employee handbooks" which referred to the new hires as "probationary part-timers," welcomed the employees to the "Kroger team," encouraged them to use the handbooks "during your first several weeks at Kroger," and described the lengthy training and support they would receive from Kroger. Resp. App. 12a; CS Appl. App. 140-161.

Nevertheless, the trial court determined that the "local union representatives and the [company] negotiators acquiesced in Kroger's treatment of all new hires as part-timers" (not as "casuals" as Kroger repeatedly represents in

its petition) and in Kroger's practice of not paying contributions on their behalf while they were labeled as part-timers. Pet. App. 6a-7a. Further, it determined that the new hires were told about Kroger's practices when they were hired. *Id.* While the district court explicitly found that Local 528 negotiators and the new hires were aware of Kroger's practices, it did not determine that Central States was aware of or acquiesced in the practices as Kroger repeatedly and erroneously represents in its petition. Pet. App. 22a-26a. The trial court determined that these "local understandings cannot prevail against the definition of 'probationary' employees contained in Article 2.2 of the Master Agreement. Because the employees were not casual, they were necessarily probationary and therefore, entitled to fringe benefits. They were, in the formulation of the court of appeals, regular employees who worked for a shorter week. (In fact, they often worked a full week, but in no event were they 'casual' employees under the definition in the master agreement)." Pet. App. 26a.

The court of appeals affirmed. The court of appeals noted that the parties devoted most of their arguments to the question of the meaning of the ambiguous term "part-time" but it indicated that "[w]e shall begin our analysis, however, by examining one of the unambiguous terms of the CBA—the term 'casual employee'." Pet. App. 12a. The court of appeals indicated that it agreed with the district court's determination that the contract definition of casual employee indicated that the term "refer[ed] to those employees that Kroger intended, when it hired them, to work for a short period of time . . . [who] would not be employees Kroger expected 'in the normal course' to work 'for long periods of time' . . . [but] would be people 'who come and go, people whose employment was interrupted, people who might be absent for long periods of time' rather than people 'who are on hand continuously to work part-time as needed.' " Pet. App. 12a-13a. The court of appeals noted that the

evidence concerning whether the new hires fell under the contract definition of casual employees was disputed, however, the court of appeals recognized that the district court's finding was to be reviewed for clear error and it concluded that there was sufficient evidence to support the district court's determination that the employees were not casual employees. Pet. App. 14a.

The court of appeals then held that under § 515 of ERISA, "Kroger's practice of treating the employees as "casuals" [so that they were ineligible] for pension contribution purposes when, in fact, those employees were not hired on a short-term basis or employed from time-to-time cannot thwart the unambiguous definition of casual employees contained in the CBA." Pet. App. 16a.

SUMMARY OF THE ARGUMENT

In an effort to create a conflict between the Seventh Circuit and the Third Circuit, Kroger claims that the court of appeals made a holding that it did not make, and it asserts new arguments that it did not make in the court below. Contrary to Kroger's assertion, the court of appeals did not address the issue of whether § 515 barred "extrinsic evidence to establish that a CBA term is ambiguous . . . [so] that petitioner was bound by what the court took to be the CBA's definition of 'casual employees'." Instead, the court indicated that the meaning of the term "casual employees" could be determined solely from the contract language because the parties had *agreed* that the term was unambiguous.

Nor did the court of appeals hold—as Kroger claims in its petition—that the rule barring evidence of a union-employer agreement at odds with an employer's unambiguous written agreement it had adopted in earlier cases under § 515 of ERISA, applied even when the fund received contemporaneous notice of the union-employer agreement. This issue was not addressed because Kroger did not argue that Central

States had contemporaneous notice of the Kroger-Local 528 understanding.

Even if the court of appeals made the holdings claimed by Kroger, the writ should be denied because Kroger could not prevail on the merits if the Third Circuit's approach was adopted. Kroger completely ignores the Third Circuit's requirement that its proffered contract interpretation must ultimately be anchored in the language of the contract. Kroger's claim that unambiguous CBA language defining casual employees as those employees "hired on a short-term basis [who] work from time-to-time" can be trumped by parol evidence allegedly indicating that the parties really intended the term to mean employees hired to be permanent additions to the workforce, would not be permitted in the Third Circuit because the interpretation is completely at odds with the contract language.

ARGUMENT

I. THE DECISION BELOW DOES NOT CONFLICT WITH ANY OTHER CIRCUIT COURT DECISION.

A. The Decision Cited By Kroger Authorizing Consideration Of Extrinsic Evidence Is Distinguishable Because Neither Party Argued That The Term "Casual Employee" Was Ambiguous.

Kroger represents that the court of appeals held that Kroger "was bound by what the court took to be the CBA's definition of 'casual employees' in the master agreement because that term was not obviously ambiguous" and as a result, the court of appeals refused to consider Kroger's extrinsic evidence designed to show that the term was really ambiguous. Petition at 8. According to Kroger, this determination should be reviewed because it conflicts with the decision in *Teamsters Industry Employees Welfare Fund v. Rolls-Royce*

Motor Cars, Inc., 989 F.2d 132 (3rd Cir. 1993), where the Third Circuit held that parol evidence could be considered to determine whether a facially clear contract term was really ambiguous.

However, the court of appeals' determination that the term "casual employee" was unambiguous was not, as Kroger argues, based upon the court of appeals' judicial determination that the term was facially clear. To the contrary, the reason the court of appeals decided that the term was clear was because the parties did not argue that the term was unclear. The court of appeals stated:

> Section 2.3 of the Master Agreement states that casual employees, who are hired on a "short term basis," may be "employed from time to time" at Kroger facilities with a history of hiring such employees. CBA § 2.3. *The parties do not claim that the meaning of "casual," as it is used here, is ambiguous; nor have they questioned the meanings of "short-term basis" or "from time to time."*

Pet. App. 12a (emphasis added). This determination is obviously correct. In the courts below, Kroger tried to show that the new hires were hired on a short term basis to work from time to time so they were encompassed by what it conceded to be the clear contract definition of the term casual employee. That effort has failed so Kroger argues a completely new theory in its petition—it maintains for the very first time that the term casual employee is unclear and was really intended to encompass long term, permanent employees. However, Kroger should not be permitted to obtain review based upon an argument that was not made in the court below.

To be sure, the court of appeals' initial decision indicated that the contract was ambiguous. However, the perceived ambiguity had nothing to do with the term casual employee

but was premised upon "the term part-time—a term central to the issue in this case—[which] is susceptible to more than one reasonable meaning thus rendering the CBA ambiguous." Pet. App. 50a. In the court's view, the term "part-time could mean casual" as Kroger contended and if so, a part-time employee would be a short term employee who worked from time to time who was ineligible for pension benefits. *Id.* On the other hand, the term part-time employee could "refer to a regular employee who works a shorter week" as Central States contended and if so, the contributions were due because the contract required contributions on all regular employees, even if they only work part-time. *Id.* But the court of appeals' earlier decision did not express any doubt about the meaning of the term "casual employee." As a result, the parties' parol evidence at trial was directed at proving that the terms were or were not synonymous and that the employees actually were or were not casual employees, but neither party ever argued that term casual employee was unclear. Pet. App. 12a, 23a.

Certainly there is nothing controversial about the refusal to consider parol evidence to determine the meaning of a term that the parties agreed was clear, and the *Rolls-Royce* decision does not suggest that a court should consider such evidence on its own initiative. At a minimum, the Third Circuit would require a party to at least claim that a facially clear term was actually ambiguous before considering parol evidence. Since neither party suggested that the term "casual employee" was unclear, the *Rolls-Royce* decision is distinguishable and does not conflict with the court of appeals' decision.[2]

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[2] Kroger erroneously represents that the district court determined that Local 528 and Kroger had agreed to the treatment or designation of the newly hired as "casuals." Petition 8, 9. In fact, the district court determined that Kroger and Local 528 "acquiesced in the treatment of all new hires as 'part-timers' not entitled to pension contributions," but at no point did it indicate that they had agreed to treat the part-time employees

B. The Court Of Appeals Did Not Determine That Section 515 of ERISA Bars Consideration Of Union-Employer Understandings That Are Actually Disclosed To Multi-Employer Funds.

Kroger does not challenge the unanimous view of the courts of appeal "that Section 515 allows funds to enforce CBAs free of certain defenses that the employer might otherwise assert in an action brought by the union, including . . . oral modifications by the union and employer unknown to the fund." Petition at 2. However, Kroger contends that the Seventh Circuit impermissibly extended this rule by prohibiting consideration of union-employer understandings that are contemporaneously disclosed to a fund. According to Kroger, this holding creates another conflict with the Third Circuit's *Rolls Royce* decision where, in Kroger's view, the court held that § 515 does not bar an employer defense based upon a union-employer oral agreement that has actually been disclosed to a Fund. But nothing in the Seventh Circuit's decision remotely forecloses an employer defense predicated upon an oral understanding that has been actually disclosed to a fund. That issue was not addressed because there was no finding that the Kroger-Local 528 understanding had been disclosed to Central States because in fact, it was not disclosed. Therefore, the decision below does not conflict with the Third Circuit's decision.

The court of appeals held that § 515 of ERISA "entitles pension funds to enforce the terms of agreements when those terms are unambiguous," so Central States' reliance upon the writing could "not be thwarted by oral understandings

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under the contract definition of casuals. In fact, the district court found Kroger's evidence that the terms were used synonymously by the parties to be "unpersuasive" and determined that Local 528 and Kroger "acted according to their own lights, with little or no regard to whether their mutual understanding of whom would be paid fringe benefits comported with the terms of the master agreement." Pet. App. at 23.

between the employer and union." Pet. App. 11a, 16a. Nothing in the opinion indicates that the court of appeals believed that Central States actually knew about the understanding or that the rule that § 515 of ERISA bars evidence of oral understandings when there was disclosure to the Fund. The court of appeals reviewed several of its prior rulings under § 515 and noted that in one case, it had held that even a written union-employer side agreement would not be a valid defense to a multiemployer fund's claim, but only if it had "not been disclosed to the fund." Pet. App. 11 (citing, *Central States Pension Fund v. Transport, Inc.*, 183 F.3d 623, 628 (7th Cir. 1999)). Thus, the court of appeals actually suggested that disclosure to a fund of a written side agreement would make a difference. Further, the Seventh Circuit has indicated in its prior decisions that § 515 "precludes the use of extrinsic evidence that was *unknown to a pension or welfare fund*" thereby suggesting that disclosure to the fund of an oral agreement might make a difference. *Central States Pension Fund v. Transport, Inc.*, 183 F.3d at 628, *quoting*, *Central States Pension Fund v. Central Cartage Co.*, 69 F.3d 1312, 1315 (7th Cir. 1996)(emphasis added).[3] Thus, Kroger's assertion that the decision below forecloses employer defenses based upon a side agreement that was disclosed to a fund is not accurate.

The issue of whether the rule barring evidence of oral union-employer agreements disclosed to a fund was not addressed by the court of appeals for the simple reason that

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[3] In *National Boilermakers Welfare Joint Trust v. Florida Lining & Welding, Inc.*, 2000 WL 420749 (N.D. Ill. April 12, 2000), then District Judge Williams held that the Seventh Circuit's decisions under § 515 did not bar evidence of an oral understanding that was contemporaneously disclosed to a fund. Six months later, Judge Williams was a member of the Seventh Circuit that unanimously denied Kroger's petition for rehearing *en banc*, so she apparently did not believe the panel decision made the holding that Kroger now claims was made.

Kroger did not argue that Central States knew about the oral agreement, and the reason Kroger did not make the argument was because there was no evidence of actual disclosure of the agreement to Central States. Instead, the argument in Kroger's appellate brief was limited to the assertion that § 515 did not bar consideration of its parol evidence because its agreement was ambiguous, so the evidence of the union-employer understanding was being offered to decipher the contract language, not to contradict the terms of an unambiguous agreement. Resp. App. 6a-8a. With respect to Central States' knowledge, Kroger only argued that Central States knew about the 1991 grievance decision before Central States initially asserted its claim for additional contributions and Kroger maintained that Central States had a duty to investigate to determine what the parties actually intended because the contract was unclear. *Id.* However, in its argument relating to the scope of § 515, Kroger never asserted that Central States had actual knowledge about the Kroger-Local 528 understanding before the 1991 audit. *Id.*

The reason Kroger did not argue that Central States was aware of the Kroger-Local 528 understanding was because it was clear that Central States did not know. The district court specifically found that Local 528 and Kroger acquiesced in the exclusion of the new hires and the new hires were told they would be excluded. Pet. App. 6a, 7a. Central States' name is conspicuously missing from this listing of who was aware of the understanding.[4] No witness testified that Central

[4] It is true that the district court indicated in connection with Kroger's estoppel defense that Central States had been silent "over the long period of time involved." Pet. App. 24a. However, the court made no finding with respect to the reason for Central States' silence and ultimately rejected the estoppel defense because Central States had not made a knowing misrepresentation to Kroger but was "[a]t most . . . negligent." Pet. App. 25a. The reason for Central States' silence was its utter lack of knowledge of the Kroger-Local 528 understanding.

States was told and no document showed that Central States received express notice of Kroger's agreement. *Id.*

In connection with its estoppel defense (and only in connection with the estoppel defense) Kroger claimed that Central States should have known about its practices because beginning in 1975, Kroger allegedly provided Central States with a monthly computer printout listing hundreds of employees that, if carefully examined, would have shown for a minuscule portion of the listed employees that there was "a significant gap between the date of hire . . . and the date on which the petitioner began making contributions on them." Petition at 25. However, both Kroger and Central States agreed that Central States disregarded these printouts because they were not in a useful format for Central States. Resp. App. 9a-10a; Trial Tr. 591-97, 810-12. Thus, even Kroger conceded that these reports did not provide Central States with actual notice of the understanding. *Id.* Even if the printouts had been examined, they did not tell Central States the reason for the gap or that, contrary to the explicit language of the agreement, that contributions would not be paid on permanent employees after 30 days of employment. Further, Kroger's assertion that Central States received these printouts beginning in 1975 is untrue. In fact, Central States did not begin receiving the printouts until October 1987. Trial Tr. 696-97

Kroger also argues that Central States knew about the understanding because R. Jerry Cook was the President of Local 528 and, beginning in 1985 or 1986, he was also a Trustee of Central States. While the district court found that the local union negotiators acquiesced in Kroger's practice of labeling all new hires as part-timers, there was no finding that Cook was ever personally aware of the practice. In fact, Cook testified at trial without contradiction that he did not know about the practice prior to the 1990 grievance proceeding. Trial Transcript 21, 28, 36-37. Kroger also

advised the court of appeals that Cook "was totally uninvolved in the day to day administration and negotiation of the Atlanta Local Supplement" and it conceded that at the time of the 1991 grievance hearing, Cook thought the "contributions [sought by Central States] were required." Resp. App. at 2a-3a. In its closing argument at trial Kroger also indicated that Cook's testimony established "how little he knew . . . . about what was going on in the Atlanta warehouse over the extended period of time from 1976 to 1991" and that during that time frame Cook "played . . . [a] minimal role in negotiation and administration of the local supplement language . . . and was not involved in the detailed administration or negotiation of the local supplement language covering the Atlanta warehouse". Trial Tr. at 907-8. Given Kroger's concessions concerning Cook's lack of knowledge, Kroger's claim that Central States knew about the understanding because Cook was a trustee is obviously without merit.

Moreover, even if Kroger had proved Cook was aware of the understanding, the alleged knowledge gained by Cook in his union capacity before he became a Central States trustee, was not obtained within the scope of his duties as a trustee and is not attributable to Central States. *Illinois Conference of Teamsters Welfare Fund v. Mrowicki*, 44 F.3d 451, 464 (7th Cir. 1994). To be binding upon Central States, Kroger would have to show that Cook actually disclosed the agreement to Central States which Kroger could not do because Cook was unaware of the agreement and he never discussed the contract negotiations with anyone at Central States. Trial Tr. 16.

Since the decision below does not preclude employer defenses based upon oral agreements that are actually disclosed to a fund, Kroger's petition should be denied.

C. The Third Circuit Would Not Permit Kroger to Contradict The Unambiguous Contract Definition Of The Term Casual Employee Even If Kroger's Unusual Meaning Had Been Disclosed to Central States.

Even if the Seventh Circuit had determined that an oral understanding which had been disclosed to Central States was not binding as Kroger now contends, that determination would not be contrary to the Third Circuit's *Rolls-Royce* decision. *Rolls-Royce* is distinguishable because in that case, the determinative factor was the ambiguity of the contract, not the knowledge of the fund.

The Third Circuit has dealt with a case involving the effect of a fund's knowledge of the bargaining history where the contract language was unambiguous, as it was determined to be in this case. In that case, the court held that when the contract language was unambiguous that "it is evident from Section 515 and Congress's intent in passing it that the fund still should be able to rely upon the language of the collective bargaining agreement as written . . . even if a multiemployer welfare fund has some knowledge of the negotiating history leading up to the agreement." *Central Pennsylvania Teamsters Pension Fund v. McCormick Dray Line, Inc.*, 85 F.3d 1098, 1103 (3rd Cir. 1996). The court observed that through § 515, Congress sought to "minimize the administrative costs of detecting and collecting delinquencies that 'detract from the ability of plans to formulate or meet funding standards and adversely affect the financial health of plans.'" *Id.* (quoting) 126 Cong. Rec. 23,039 (1980) (Rep. Thompson)). Litigation over what the agreement between the union and employer really meant, as well as whether a fund was aware of the understanding and when it obtained the knowledge is time consuming, expensive and error-prone and invites uncertainty, all to the detriment of the participants and beneficiaries that § 515 was intended to protect.

In this case, Central States has incurred over $500,000 in attorneys' fees and costs as well as substantial administrative costs and the only reason Kroger preponderated on the issue of Local 528's acquiescence was because the business agent who dealt with Kroger was unavailable to testify at trial because he died in 1991.

Further, the *McCormick Dray Line, Inc.* court indicated that if funds were required to interpret contracts "based upon information they may have regarding the negotiations of the underlying collective bargaining agreements, the chore of preparing their actuarial calculations would be highly burdensome and expensive." *Id.* There would also be significant risk that the fund might misjudge what the parties intended and if this occurred, the actuarial calculations may be erroneous and any resulting losses would be borne by the beneficiaries of the fund in the form of lower benefits or other participating employers in the form of higher contributions. The court concluded that by enacting section 515, "Congress sought to eliminate such problems, leaving to employers and unions the simpler task of insuring that the plain language of their collective bargaining agreements represent their intentions." *Id.*

In this case, Kroger signed CBAs which state that the only employees who would be excluded from pension contributions would be casual employees and it agreed to a definition that indicated the term meant employees hired on a "short term basis" who would work from "time to time." It now claims that it really meant that every new hire would be excluded from pension participation for a lengthy period of time even though the district court found that the new hires were neither short time nor working from time to time. Kroger has not explained why the CBAs unambiguously reflected the opposite of what it now claims was its "real" intent. Obviously, Kroger had the ability to make the CBAs reflect its alleged intent (which it finally did in 1992 after

Central States asserted its claim). The *McCormick Dray Line, Inc.*, decision establishes that the Third Circuit believes that § 515 obligated Kroger to insure that the contract reflected its actual intent and Central States should not be forced to litigate over the parties "real" intent and whether the "real" intent was conveyed to Central States.

Kroger's effort to evade the unambiguous contract language is also prohibited by § 302(c)(5) of the NLRA. 29 U.S.C. § 186(c)(5). Section 302(c)(5) permits employer payments to multiemployer plans only if "the detailed basis on which such payments are to be made is specified in a written agreement with the employer." 29 U.S.C. § 186(c)(5). Section 302 was enacted because Congress was "concerned with corruption of collective bargaining through bribery of employee representatives by employers with extortion by employee representatives, and with the possible abuse by union officers of the power which they might achieve if welfare funds were left to their sole control." *Arroyo v. United States*, 359 U.S. 419, 425-6 (1959). "The Congressional intent was to allow each employer to know and . . . have a basis for enforcing his rights, and to eliminate discretion in union leaders to divert the funds." *Gariup v. Birchler Ceiling Co.*, 777 F.2d 370, 375 (7th Cir. 1985), *quoting*, *Denver Metro Plumbing Contractors v. Journeymen Plumbers Local 208*, 586 F.2d 1367 1372 (10th Cir. 1978). "Congress required that a written agreement exist between the employer and the employees' representative governing the rights of employees on whose behalf the contributions were made to ensure 'that employee benefit trust funds are legitimate trust funds, used actually for the specified benefits to the employees of the employers who contribute to them'." *Id.*, *quoting*, *United Mine Workers Association Health Fund v. Robinson*, 455 U.S. 562, 570 (1982).

Based upon these considerations, the Third Circuit held in *Lewis v. Seanor Coal Co.*, 382 F.2d 437, 443 (3rd Cir. 1967)

that § 302(c)(5) prohibited an employer from relying upon oral understanding to vary its written promise to a pension fund. Based upon 302(c)(5), other courts have refused to enforce oral understandings, even where the employer has, like Kroger, asserted that a trustee of the fund was aware of the agreement. *Teamsters Local 348 Welfare Fund v. Kohn Beverage Co.*, 749 F.2d 315 (6th Cir. 1984); *Boyle v. North Atlantic Coal Co.*, 331 F.Supp. 1107 (W.D. Pa. 1971), *cf*, *Straub v. Western Union Telegraph Co.*, 851 F.2d 1262 (10th Cir. 1988) (ERISA prohibits oral modification of trust provisions by trustees); *Nachwalter v. Christie*, 805 F.2d 956 (11th Cir. 1986) (same).

McCormick Dray Line, Inc. and *Seanor Coal Co.* establish that the Third Circuit would not permit Kroger to rely upon an intent that was not reflected in the unambiguous CBA definition of the term casual employee, even if the employer argued that the intent had been disclosed to Central States. Therefore, the petition should be denied.

II. THE WRIT SHOULD BE DENIED BECAUSE KROGER WOULD NOT PREVAIL IF THE THIRD CIRCUIT'S FORMULATION FOR DETERMINING CONTRACT AMBIGUITY WAS ADOPTED.

Kroger makes the astonishing assertion that the Third Circuit has completely abandoned the parol evidence rule and destroyed a party's right to rely upon an unambiguous contract. In Kroger's view, a party can always submit parol evidence to add to, modify or contradict contract language that is clear on its face. In reality, the Third Circuit's approach is far narrower than Kroger represents.

To determine whether a contract is ambiguous, the Third Circuit would "hear the proffer of the parties and determine if there are objective indicia that, from the linguistic reference point of the parties, the terms of the contract are susceptible

of different meanings." *Rolls Royce*, 989 F.2d at 135 (*quoting*, *Sheet Metal Workers, Local 19 v. 2300 Group, Inc.*, 949 F.2d 1274, 1284 (3rd Cir. 1991). Reference must be made to the "contract language, the meanings suggested by counsel and the extrinsic evidence offered in support of each interpretation." *Id.* What Kroger fails to mention is that "the focus must remain on the [contract] language selected by the parties" and the parol evidence is considered only because the meaning of words can depend upon the context and what seems clear without context may be ambiguous when understood from the linguistic reference point of the parties. *American Cyanamid Co. v. Fermenta Animal Health Co.*, 54 F.3d 177, 181 (3rd Cir. 1995). Thus, the determination of whether ambiguity exists must be anchored on the contract language so "a text unambiguous when accorded the commonly understood meaning of its words cannot be disregarded unless extrinsic evidence is such as to cause a reasonable fact finder to understand the text differently." *Id.* So the parol evidence can only be used for the very limited purpose of illuminating the context of the agreement, but it cannot be used to contradict the contract language as Kroger seeks to do in its petition. *Id.*

Kroger completely ignores the need to connect the parol evidence with the contract language for the simple reason that its proffered interpretation is not only unsupported by the contract language, it actually contradicts it. Kroger claims that despite the language defining casual employees as employees "hired on a short term basis" to work "from time to time", the extrinsic evidence showed that the parties really intended the term to refer to employees that the district court determined were actually long-term, permanent employees. However, Kroger's evidence does not cast any doubt on the meaning of the language of the contract, at most, the evidence shows that the parties made a side agreement that patently conflicts with the contract language. However, evidence of an oral understanding cannot be used to contradict the clear

language of the agreement. *Id.* Thus, the Third Circuit would not determine that the CBAs were ambiguous.

Kroger also claims that its petition should be granted because the Seventh Circuit's opinion improperly forecloses an employer from claiming that its contract is extrinsically ambiguous—meaning the contract is clear on its face to the untutored reader but anyone familiar with the real world context would wonder what the parties really meant. *AM International, Inc. v. Graphic Management, Inc.*, 44 F.3d 572, 574 (7th Cir. 1995). However, Kroger did not assert that its contract was extrinsically ambiguous so the Seventh Circuit did not decide that the extrinsic ambiguity doctrine was unavailable in this case. As such, the issue of the availability of the doctrine could not be resolved in this case.

Indeed, this is not a case where the extrinsic ambiguity doctrine could apply. Only evidence provided by disinterested third parties can be used to establish extrinsic ambiguity and Kroger provided absolutely no such evidence. *Id.* at 575. Kroger's reliance upon *Raffles v. Wichelhaus*, 2 H.&C. 906, 159 Eng. Rep. 375 (Ex. 1864) is misplaced. In *Raffles*, the contract was extrinsically ambiguous because even though the reference in the contract to the ship Peerless was clear on its face, objective extrinsic evidence showed that there were two ships named the Peerless. The example concocted by Kroger in its petition based upon *Raffles v. Wichelhaus* ignores the fact that the contract in this case, unlike the contract in *Raffles v. Wichelhaus*, did explicitly define the contract term. A more analogous example would be a case involving a contract that required contributions on employees working on the Peerless which then defined the term as the Peerless on the Potomac. Certainly, no court would allow the employer to limit its obligation because the union and employer claim that they really meant the employees on the Peerless in Lake Michigan because the contract language clearly indicated otherwise. So too, Kroger cannot argue that

a contract that used the term casual employee and then defined the term as employees hired on a "short term basis" who work "from time to time" really means that casual employees were those employees who were found to be permanent, long-term employees by the district court.

It is not the law in any circuit (including the Third Circuit) that an employer can use parol evidence, not to explain a contract term, but to contradict the explicit contract definition of the term. Since Kroger could not prevail, its petition should be denied.

CONCLUSION

For the foregoing reasons, respondents request that the petition for writ of certiorari be denied.

Respectfully submitted,

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APPENDIX A

Nos. 99-2257 and 99-3014

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

CENTRAL STATES, SOUTHEAST AND SOUTHWEST
AREAS PENSION FUND, AND
HOWARD MCDOUGALL, TRUSTEE,
Plaintiffs-Appellees,

v.

THE KROGER CO.,
Defendant-Appellant.

On Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division
No. 93 C 3669
Honorable John F. Grady, Judge Presiding

BRIEF OF DEFENDANT-APPELLANT

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Dated: September 20, 1999

* * *

G. The District Court Ignored the Final and Binding Step 3 Grievance Committee Decision That Pension Contributions Were Not Required for Atlanta Warehouse Part-Timers, Which Was the Most Compelling Evidence of the Parties' Intent.

For at least 15 years and five CBA terms, from at least 1976 to 1991,[21] Kroger did not make pension contributions to the Fund on behalf of Atlanta warehouse part-timers, with the full knowledge and acquiescence of the Union. During that entire time, Flournoy was responsible for day-to-day administration of the CBA in Atlanta and was also the Union's chief negotiator for the Atlanta Local Supplement, with personal, primary responsibility for preparing the Union's contract proposals. (A0029-0030; PXs 118-120.) Cook was President of the Local and a Trustee of the Fund. (A0019-0020.)

In late 1990, Cook, who had never received a complaint, comment or grievance from anyone at Kroger's Atlanta warehouse regarding non-payment of pension contributions for part-timers, (A0026), was told by Flournoy that steward Scott Chandler believed, after review of the CBA, that the Company was in violation for not making the contributions and that "they were just going to start making them really

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[21] Based on a stipulation entered into by the parties hereto in 1994, more than three years *before* completion of discovery, this Court concluded that "[p]rior to 1977, all newly hired warehouse employees were designated as probationary. In 1977, Kroger changed that designation and classified all newly hired warehouse employees as casuals." 73 F.3d at 729. However, the trial record reveals that some employees hired before 1977 were hired as *part-timers* (PX 131; R. 209—Christopherson 26-28), and others did not have pension contributions made until months after their date of hire *in 1976* (DX 18; PX 72, 143 (Lyons, Harrington, Worthy, Hill).) There is no evidence that Kroger "reclassified" new hires in Atlanta; though many employees prior to 1977 had contributions made approximately 30 days after hire, that could have been because they immediately bid on regular, full-time positions.

abide by this contract." (A0027-0028.) Cook, who was totally uninvolved in the day-to-day administration and negotiation of the Atlanta Local Supplement, had only his interpretation of the CBA to go on (he thought contributions were required), (A0025-0026), but nevertheless took no action, other than to tell Flournoy and Chandler to proceed through the contractual grievance procedure on the matter. (A0027, 0034-0036, 0050.) [22]

The Union's grievance claiming pension contributions for Atlanta part-timers was submitted for final resolution in accordance with the terms of the CBA, was heard under the Committee's Rules, and was denied by the appropriate Committee, consisting of Company representative Horn and International Union Representative Tomes, in March, 1991. (A0030-0035, 0208-0217; R. 23, Exs. X, Z; DXs. 48, 133, 181.)

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[22] Cook did absolutely nothing, after expressing his concern as to "why hasn't somebody brought this to our attention before?", that would support a finding that the Union thought contributions for Atlanta part-timers were required. Thus, he conceded that he did not seize control of the matter from Flournoy. Nor did Cook report to the Fund Trustees that he believed a substantial stream of contributions owed for Atlanta part-timers had slipped through the cracks. (A0036; R. 23, Ex. L.) Nor did Cook have any conversation with the International Union Representative on the Step 3 Committee that heard the grievance, Glen Tomes, (A0034), or prepare any written submission to the Step 3 committee in support of the grievance. (A0035.) Nor did Cook review his negotiation notes for support for his interpretation on the issue. (A0036.) Indeed, Cook relied entirely on Flournoy, who, if one believes Cook's personal interpretation of the CBA, had dropped the ball over all those years, to present the grievance to the Step 3 Committee. (A0034-0035, 0050.) Cook's passive reaction to these events, and his willingness to stay the course with business agent Flournoy in the grievance procedure, raise the strong inference that the status quo, not to pay contributions on Atlanta warehouse part-timers, was in fact the Union's interpretation of the CBA language, or at least was viewed by the Union as a permissible interpretation of it.

The Step 3 Grievance Committee's deliberative process is conclusive evidence of the parties' intent with respect to the terms "part-time," "casual," "probationary," and "regular," because the record is undisputed that the Grievance Committee considered, discussed *and* interpreted every CBA provision at issue. *See*, Statement of Facts, *supra*, 12-13.

The Step 3 Grievance Committee decision is the most relevant extrinsic evidence of the parties' intent and, therefore, deserves special consideration. The District Court's utter disregard for the Committee's ruling, and its scornful treatment of the Committee ruling during closing arguments (A0284-0285), is erroneous as a matter of law. *See Advantage Enterprises*, *supra*, 813 F. Supp. at 597-98 (joint labor-management grievance decision is the "most relevant extrinsic" evidence of the parties' intent regarding pension contributions); *cf.*, *Suburban Teamsters Welfare Fund v. CH Heist Corp.*, 1988 WL 96326 (N.D. Ill., Sept. 8, 1988) (arbitrator's decision probative evidence of parties' intent, as well as an informed opinion on the meaning of the CBA). In the landmark "Steelworkers Trilogy" cases, the U.S. Supreme Court unequivocally stated that "[f]inal adjustment by method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement." *United Steelworkers of America v. American Mfg. Co.*, 363 U.S. 564, 566 (1960); *see also United Steelworkers of America v. Warrier and Gulf Navigation Co.*, 363 U.S. 574, 581 (1960) ("Arbitration is the means of solving the unforeseeable . . . in a way which will generally accord with the variant needs and *desires of the parties*. The processing of disputes through the grievance machinery is actually a *vehicle by which meaning and content are given to the collective bargaining agreement* . . . . The grievance procedure is, in other words, *a part of the continuous collective bargaining process*. It, rather than a strike, is the

terminal point of a disagreement.") (emphasis added). Accordingly, without judicial review of their underlying merits, dispositions of disputes under a CBA's grievance procedure are enforceable whether they are the product of formal arbitration (*United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960)) or final decision by a joint grievance committee. *General Drivers, Warehousemen and Helpers, Local Union No. 89 v. Riss & Company*, 372 U.S. 517 (1963); *Chicago Cartage Co. v. International Brotherhood of Teamsters Local 710, et al.*, 659 F.2d 825 (7th Cir. 1981).

The District Court gave no weight whatsoever to the parties' determination of what their own intent had been over the years on the issue of pension contributions for Atlanta part-timers, as ultimately reflected in the Step 3 Committee decision. Nor did the District Court explain, as this Court requires, why the Step 3 decision, though "derived from the [CBA], viewed in the light of its language, its context, and other indicia of the parties' intention," was "totally unsupported by principles of contract construction and the law of the shop." *Chicago Cartage Co., supra,* 659 F.2d at 827 and cases of this Court cited thereat; *Ludwig Hanold Mfg. Co. v. Fletcher*, 405 F.2d 1123, 1128 (3rd Cir. 1969). Given this Court's holding, as a matter of law, that the CBA is ambiguous, it is axiomatic that the Step 3 Committee's unanimous decision (as would the decision of an impartial arbitrator had it not been unanimous) focused on the parties' intent, consistent with this Court's mandate. *See, Elkouri and Elkouri, How Arbitration Works* at 471 (5th Ed.) (Arbitrator's primary goal in dealing with an ambiguity in a CBA "is to determine and carry out the mutual intent of the parties"). As to the intent of Kroger and the Union in entering into the relevant CBA provisions bearing on this case, pursuant to this Court's mandate, there is no better evidence of the parties' intent than the Step 3 Grievance Committee decision issued pursuant to the CBA's provisions by the parties' handpicked

representatives. Even the Fund's own auditors considered the decision of the joint Step 3 Committee to be a clear reflection of the parties' intent. (DX 39, pp. 10010, 10065, 10068, 100106, 100111.) [23]

* * *

IV. THE FUND CANNOT USE THE SHIELD OF *McCLELLAND* AND *GERBER* TO AVOID THE EXTRINSIC EVIDENCE OF THE PARTIES' MUTUAL INTENT THAT IT NOT RECEIVE CONTRIBUTIONS FOR THE ATLANTA WAREHOUSE PART-TIMERS.

A. *McClelland* and *Gerber* Do Not Apply to this Case.

This Court's prior decision in this case emphasized that: (1) "the Fund is entitled to rely on the terms of the documents to define eligibility for benefits;" (2) the Fund's "right to contributions may not be frustrated by *unilateral* actions of the employer which contravene the terms of the collective bargaining agreement," (emphasis added), citing *Central States, Southeast & Southwest Areas Pension Fund v. McClelland, Inc.*, 23 F.3d 1256, 1258 (7th Cir. 1994); and (3) oral side agreements or collateral defenses by the parties to the CBA cannot trump a pension fund's entitlement to contributions pursuant to CBA and contribution agreement terms, citing *Central States, Southeast & Southwest Areas Pension Fund v. Gerber Truck Service, Inc.*, 870 F.2d 1148, 1149, 1153 (7th Cir. 1989) (*en banc*). 73 F.3d at 733. *McClelland* and *Gerber*, which both involved CBAs that were found *unambiguous*, stand for the general proposition

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[23] The Fund's election to disregard the requirements of its own audit manual, and the opinions of its own auditors with regard to the ambiguity of the contract, notwithstanding the Step 3 grievance decision, (A0057, 0133-0135, 0230-0231, 0233-0234; DXs 40, 44, 45, 50, 51), cannot detract from the importance of the final grievance result as extrinsic evidence of the parties' intent under this Court's mandate.

that the parties to a CBA cannot effectuate a meaning that is contrary to its written terms, or enter into a secret, side agreement not to abide by the written, unambiguous CBA terms, rather than acting exactly as they agreed, in writing, in the CBA. In both *McClelland* and *Gerber*, the parties to the CBAs entered into *unambiguous* written terms broadly requiring pension contributions to the Fund, but then agreed, orally, to limit contributions to much smaller numbers of employees within the broader categorization; in other words, they purported to modify *unambiguous* written agreements with secret side agreements.

This is not that case. Rather, here both parties to the CBA agreed, in writing, ultimately confirmed in contractually-mandated final and binding arbitration, that pension contributions were not owed on Atlanta part-timers. Such mutual agreement under these circumstances, as reflected in the extrinsic evidence, is entitled to enforcement against the Fund's claim, *regardless* of the Fund's knowledge of the extrinsic evidence. This is particularly true here, where the Fund admitted during pretrial discovery that:

> "If Kroger's Atlanta collective bargaining agreements *are ambiguous* [which this Court held they were, 73 F.2d at 733], Central States *concedes* that it cannot make *any* argument based upon its participation rules because *it did not investigate to determine the parties' intent.*" (DX 154 at 2) (Emphasis added.)

The extrinsic evidence in this case is not being used to impermissibly modify an unambiguous CBA, thereby blind-siding the Fund, but is being used properly to interpret ambiguity in the CBA. Given that the CBA was ambiguous, that there was no secret side agreement, that the Fund knew of the ambiguity and was aware of the parties' interpretation of their mutual intent, as reflected, *inter alia*, in the Step 3 Grievance Committee decision, before it nonetheless made its final assessment and instituted the present litigation, (A0057,

0133-0135, 0230-0231, 0233-0234; DXs 40, 44, 45, 50, 51, 154), and the Fund's admission that, in these circumstances, it was obliged to, but did not, investigate to determine the parties' intent, the Fund cannot hide behind *McClelland* and *Gerber*, in order, to obtain contributions here. *See*, *Moriarty v. Svec*, 164 F.3d 323, 331-32 (7th Cir. 1998) ("[u]nlike *Gerber*, this is not a case where the pension plan's expectations are being frustrated by secret side agreements negating previously negotiated CBAs. . . . that both parties agree on the term's interpretation does not automatically make that understanding an impermissible side deal."); *Pabst Brewing Company, Inc. v. Corrao*, 161 F.3d 434, 442 (7th Cir. 1998) ("[A]s we have stressed in cases like [*Gerber*], the written word must prevail over subjective understandings *unless* one of those gaps 'crying out to be filled' exists or the agreement is genuinely ambiguous."); *Central States, Southeast & Southwest Areas Pension Fund v. Central Cartage*, 69 F.3d 1312, 1315 (7th Cir. 1995), *cert. denied*, 517 U.S. 1134 (1996); *Chicago Area International Brotherhood of Teamsters v. Kennicott Bros. Co.*, 1998 WL 122777, 1998 U.S. Dist. LEXIS 3115 at *22 (N.D. Ill., Mar. 13, 1998).

V. THE FUND IS ESTOPPED FROM CLAIMING THAT PENSION CONTRIBUTIONS ARE OWED ON THE EMPLOYEES AT ISSUE.

In its Complaint, Central States alleges as follows, in paragraph 19:

> The audit of the Defendant's records for the period of December 28, 1986 through December 30, 1989 *revealed* that the Defendant breached the provisions of ERISA, the collective bargaining agreements, the Participation Agreement and the Pension Fund Trust Agreement *by failing to accurately report employee work history and pay all contributions* (and interest due

thereon) to the Pension Fund for the period of December 28, 1986 through December 30, 1989.

(Emphasis added). As the evidence established, however, this is simply not a true statement, first, because Kroger *did* accurately report its employees' work history and pay all contributions due, and second, because any lack of reporting was not "*revealed*" or "*discovered*" in the audit. Rather, the audit "revealed" only that the Fund had simply failed to look at the work histories Kroger sent in every month, and had failed to read the ambiguous CBAs when they were routinely sent in pursuant to the Trust Agreement, or to pursue the ambiguity once it became readily apparent to the Fund, before and during the audit. (A0055, 0056, 0131-0132, 0198-0199.) Kroger had been providing the Fund with information reflecting this supposed "discovery" for years before the audit.

Because the Fund knew all along that no contributions were paid on the employees at issue, and because the Fund repeatedly and continuously represented to Kroger that this non-payment was acceptable, the Fund is estopped from changing its position at this late date. Kroger established each element of this estoppel, *i.e.*; (1) a knowing misrepresentation; (2) made in writing; (3) with reasonable reliance on that misrepresentation; (4) to its detriment. *Coker v. Trans World Airlines, Inc.*, 165 F.3d 579, 585 (7th Cir. Jan. 15, 1999).[24]

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[24] Significantly, the same facts that support estoppel establish the non-existence of any purported "secret side agreement" between Kroger and the Union. Furthermore, the information Kroger provided to the Fund (including the ambiguous CBAs) precludes the Fund from prevailing in the event this Court finds there was no meeting of the minds between Kroger and the Union on any key provision.

A. The Fund's Knowing, Written Misrepresentations

The Fund made two knowing, written misrepresentations to Kroger.

1. The Monthly Bill

The Fund sent Kroger a bill each month based on the information submitted by Kroger the previous month, without relevant objection or exceptions, thereby misrepresenting to Kroger that Kroger's payment and reporting was acceptable. (A0206-0207; DX 118, 122.) Kroger's monthly reporting regularly showed a significant gap between an employee's date of hire and the date contributions began, and that contributions began when a person was added to the regular seniority list, not when the person was hired. (Statement of Facts, *supra*, 14-15.)

The Fund's misrepresentation that Kroger's monthly reporting was acceptable was caused by the Fund's decision to *disregard* the Mark IV reports which Kroger sent to the Fund each month, which revealed the gap between the employee's date of hire and the date contributions began. (DX 153 at p. 2; A0205-0206.) To knowingly disregard a document, filed in the normal course of reporting work histories, month after month, year after year, is an intentional act, far surpassing the "bureaucratic sloppiness" excused in *Coker*, 165 F.3d at 586. Kroger had no way of knowing that the Fund was disregarding a key portion of the information it sent in every month, or that the Fund had any concern about CBA ambiguity, or its contribution practices. Indeed, the Fund not only accepted the contributions but further indicated that the previous months' reporting was *acceptable*, by sending a bill for the next month incorporating precisely the changes indicated in the Form 206, without regard to the gap/delay in contributions reflected in Kroger's submissions.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 93 C 3669

CENTRAL STATES, SOUTHEAST AND
SOUTHWEST AREAS PENSION FUND TRUST,
Plaintiff,

v.

KROGER COMPANY, AN OHIO
CORPORATION,
Defendant.

Chicago, Illinois
December 21, 1998
2:00 p.m.

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE JOHN F. GRADY
VOLUME 8-B

THE COURT: All right. Thank you, Mr. Madoff.

Let me address those concerns before I give you the findings that I referred to a moment ago.

It is true that the phrase short-term basis is somewhat vague and is not otherwise defined in the agreement. I also agree that what is referred to when the term basis is used is the intent of Kroger in hiring these people; that is, their status is determined as of the date of hire and not by reference to

what happened after their hire. I suggested that the other day, and I continue to think that that is the appropriate interpretation of that phrase.

Now, the evidence persuades me that the employees in question were hired by Kroger with the hope and the expectation that they would become, each of them, full-time regular employees when an opening occurred. Kroger knew, of course, that there was nothing inevitable about that, but its hope was that the training that would be given to these employees would be utilized by the employees to complete their probationary period successfully and to equip themselves to become full-time employees when the opportunity arose.

The evidence about how these people were referred to in the handbooks and the way they were treated generally in regard to their training and nurture persuades me that they were by no means regarded as people who were likely to be on hand for only a short period of time. On the contrary; it was expected that in the normal course, they would work for a long period of time, both as what was referred to as part-timers, and then eventually as people who achieved regular employment and got on the regular seniority list.

The fact that many or perhaps even most of the new hires during the period in question did not last more than 12 weeks doesn't have very much to do with the definition of casual employees. Regardless of how things turned out in the individual case, Kroger's intention in each and every case was that the employee would survive to become a full-time regular employee. The fact that many of them did not has nothing to do with Kroger's intention at the time they were hired.

Now, having said that, let me tell you what my four findings of fact to date are:

First, the employees in question were not "hired on a short-term basis," nor were they "employed from time to time," as defined in article 2.3 of the master portion of the collective bargaining agreement.

I have already addressed the question of short-term basis. Let me take a moment to state the plain meaning of "employed from time to time." This means people who come and go, people whose employment is interrupted, people who might be absent for long periods of time. This does not refer to people who are on hand continuously to work part-time as needed.

The evidence indicates that the employees in question were available and were considered by Kroger to be available on a continuous basis to work part-time as needed during the peaks and valleys that we have heard so much about. These employees were just as continuous as the peaks and valleys were.

My second finding of fact is based upon the first one. It is that the phrase "part-time" in the local portion of the agreement is not the same as and does not mean "casual" as defined in article 2.3 of the master portion of the agreement.

My third finding of fact is that the local union representatives and the negotiators acquiesced in the treatment of all new hires as "part-timers" not entitled to pension and welfare contributions from at least 1977 through the end of the audit period and beyond. These employees were told by management that they would not be titled to benefit contributions until they had successfully bid for regular employment and had been placed on the regular seniority list. The employees fully understood that.

My fourth finding of fact is that the term "part-time" in the local portion of the agreement was interpreted by the company and the local union representatives as referring to these employees who had not been placed on the regular

seniority list and who, by reason of that fact, would not be eligible for benefit contributions, regardless of the length of time they had been employed by the company.

Now, those are the four findings that I am prepared to make and do make at this time. There might be a more felicitous way to state them, but I am going to ask you to pick them up in your proposed findings to the extent you wish to do so, and if you can improve upon the language and make it conform more closely to the evidence, you have my permission to attempt that, but certainly the substance of what I have said will be my findings on those subjects.

Now, I have not made any findings, as you note, on the question of estoppel or on the ultimate question of liability.

The legal sequences of these findings remain to be seen. It seems doubtful to me that in view of these findings, the decision of this court can be that the two portions of the bargaining agreement can be given a coherent and unified interpretation that will point to a decision in favor of one party of the other. It seems to me, rather, that there is an agreement which, as interpreted by the local representatives of the union and by the company, is marked by an inconsistent view of casual and part-time as between the two portions of the agreement.

However, I leave that to you to address in your submissions if you believe that the two portions of the agreement can be reconciled in terms of the definitions of part-time and casual.

What I would like you to do is to prepare a complete set of factual findings for my consideration which will lead to a decision in your favor.

Supreme Court, U.S.
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No. 00-1304

In the Supreme Court of the United States

THE KROGER CO.,

Petitioner,

v.

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

"[I]t is well established," this Court has written, "that the parties' 'practice, usage and custom' is of significance in interpreting their [collective bargaining] agreement." *Consolidated Rail Corp.* v. *Railway Labor Executives' Ass'n*, 491 U.S. 299, 311 (1989). Yet the Seventh Circuit thought the parties' consistent 14-year practice, usage, and custom under a CBA, as ratified through the CBA arbitration mechanism (see CBA § 32), to be of no significance in determining the scope of an employer's obligation to make pension contributions pursuant to the CBA. The only justification advanced for such a contradiction of this Court's instructions is Section 515 of ERISA, yet that statute says only that employers must make pension contributions "in accordance with the terms and conditions of" the governing CBA. To interpret ERISA in that manner is wrong, and creates a circuit split that this Court should resolve.

Respondents attempt to wish away the conflict exacerbated by the decision below. They argue that the Seventh Circuit is much more receptive to extrinsic evidence than the petition suggests; assert that the Third Circuit is much more hostile toward such evidence than our discussion suggests; and ignore the Sixth Circuit cases cited in the petition. Respondents further attempt to mislead this Court about the record in this case, arguing that the fund did not "know" of a practice that was disclosed to the fund in a report every month for 14 years and stating – in a falsehood contradicted by the very excerpts that respondents themselves attach to their brief in opposition – that petitioner did not raise in the Seventh Circuit the argument it raises here. These and respondents' other diversionary tactics should not stand in the way of this Court's resolution of an important circuit conflict and correction of an erroneous decision with highly disturbing policy implications.

1. As we explained (Pet. 15 & n.3), the decision below is part of a line of cases in which the Seventh Circuit, over several dissents, has held that extrinsic evidence may not be used in Section 515 actions to show ambiguity in CBA terms that are not facially ambiguous. Respondent Central States was a plaintiff in many of the Seventh Circuit cases applying the rule. See, *e.g.*, *Central States, S.E. & S.W. Areas Pension Fund* v. *Joe*

McClelland, Inc., 23 F.3d 1256, 1259 (7th Cir. 1994) ("extrinsic evidence may not be used to create an ambiguity in a pension or welfare agreement subject to ERISA"); *Central States, S.E. & S.W. Areas Pension Fund* v. *Central Cartage Co.*, 69 F.3d 1312, 1315 (7th Cir. 1995) (multi-employer pension agreements are not "normal two-party contract[s] for which evidence of idiosyncratic meaning may be used to depart from the objective meaning of the words"); *Central States, S.E. & S.W. Areas Pension Fund* v. *Gerber Truck Serv., Inc.*, 870 F.2d 1148 (7th Cir. 1989) (en banc). The Seventh Circuit's rule stands in direct conflict with the approach of the Third Circuit, which permits the use of extrinsic evidence to show that CBA provisions are ambiguous despite the absence of any obvious ambiguity. See *Teamsters Indus. Employees Welfare Fund* v. *Rolls-Royce Motor Cars, Inc.*, 989 F.2d 132 (3d Cir. 1993) (using parties' course of conduct to conclude that "each employee" was an ambiguous term that really meant "each regular employee").[1]

Respondents' reluctance to admit what the court below actually held is understandable, because the Seventh Circuit's extrinsic evidence rule is so plainly inconsistent with the approaches of the Third and Sixth Circuits and the text of Section 515, and because the adverse consequences of the holding are so serious for all companies that employ unionized labor. Consequently, respondents have conjured up a new version of what the Seventh Circuit held. They claim that the court of appeals did not consider petitioner's extrinsic evidence regarding the meaning of the CBA term "casual" employee because petitioner never argued that the term was ambiguous. In

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[1] According to respondents, the Third Circuit's approach to the use of extrinsic evidence in Section 515 cases is more restrictive than the petition suggests. Br. in Opp. 18-21. Respondents say that the Third Circuit will receive extrinsic evidence only for the "very limited purpose of illuminating the context of the [CBA]," provided the "focus remains on the [CBA] language selected by the parties." *Id.* at 19. In no circumstances, they submit, may the extrinsic evidence be used to contradict the language of the CBA. *Ibid.* Whatever semantic game respondents are attempting to play with those assertions, it remains impossible to conclude that the key term at issue in this case – "casual" employees – is ***less*** ambiguous than the term at issue in *Rolls Royce*, "each employee." Respondents never once acknowledge the actual, facially unambiguous contract language that was construed in that case.

addition, respondents claim that extrinsic evidence was disallowed because the district court did not make a finding that the fund was actually aware of petitioner's and the union's 14-year practice of classifying new hires as casuals until they successfully bid for a regular position on the regular seniority list. They argue that the result would have been different if there was a factual finding that the parties' interpretation of the CBA had been "actually disclosed" to the fund. Br. in Opp. 10.

a. Respondents assert that petitioner did not argue below that the term "casual" employee was ambiguous. Br. in Opp. 7-9. The assertion is false. To be sure, early on, in their respective motions for summary judgment, both sides argued that the *entire* CBA was unambiguous. Pet. App. 50a ("Neither [party] argues before this court that the CBA is ambiguous; they agree that it is unambiguous but disagree as to its interpretation."). But, as respondents grudgingly acknowledge (at Br. in Opp. 8), the Seventh Circuit held otherwise. Pet. App. 51a (holding, in light of ambiguities in the CBA, the "district court should not have treated the CBA as unambiguous and should not have declared its meaning as a matter of law on summary judgment").

Respondents urge that the only ambiguity of concern to the court of appeals was the meaning of the term "part-time" employee, and that the remainder of the CBA, including the term "casual" employee, was not found to be ambiguous. The first opinion of the court of appeals shows how spurious that claim is. The court stated several times that the entire CBA was ambiguous, not merely the term "part-time." Pet. App. 50a-51a. The ambiguities became apparent when the court attempted to harmonize references to "regular" and "casual" employees in the Master Agreement with references to "full-time" and "part-time" employees in the Local Supplement. To resolve these ambiguities, as respondents point out (at Br. in Opp. 8-9), the court was required to construe the term "part-time." But the critical issue on remand was whether the disputed contributions were due under the CBA, as it had been consistently interpreted by the parties to the CBA. Pet. App. 52a.

On remand, in compliance with the mandate of the court of appeals, petitioner and respondents introduced evidence to show how the term "casual" employee was understood by the parties to the CBA. It is disingenuous for respondents to suggest that

the meaning of "casual" employee was undisputed and therefore unambiguous. Petitioner demonstrated that the terms "casual" and "part-time" were synonymous and that, because neither group was included on the regular seniority list, neither was entitled to pension contributions. Pet. App. 32a, 34a-35a. Among other evidence, petitioner pointed to the decision of the Step 3 grievance committee, which determined that contributions were not required for the employees at issue under the longstanding interpretation of the CBA by petitioner and the union. In response, the fund argued that the employees at issue were not truly casuals but probationary employees for whom pension contributions were required. *Id.* at 39a-40a. As the Seventh Circuit recognized in its first opinion, "[w]hen parties suggest different, yet reasonable interpretations" of a contract provision, the provision is ambiguous. *Id.* at 50a. In the second appeal, petitioner argued that the entire CBA was ambiguous, and that "the Fund was fully aware of the ambiguity and of the extrinsic evidence of the parties' intent." Pet. C.A. Br. 17.[2]

b. Respondents urge that the Seventh Circuit's extrinsic evidence rule in Section 515 cases is less draconian than the petition suggests, and they ignore our discussion of the potential for misuse of this rule by pension and welfare funds. Br. in Opp. 10-14. According to respondents, the lower court's rule precludes only the use of extrinsic evidence that was not "actually disclosed" to the fund. *Id.* at 10. They tacitly concede that the Seventh Circuit has never permitted the introduction of extrinsic evidence in any reported Section 515 cases. Nevertheless, respondents hang their hat on dicta from prior decisions that, they claim, suggest that the Seventh Circuit

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[2] It is astounding that respondents would claim that petitioner did not make the same argument below as it does here, and simultaneously attach to the brief in opposition some of the very pages from the briefs below in which petitioner did make that argument. *E.g.*, Br. in Opp. App. 7a ("the CBA was ambiguous, * * * there was no secret side agreement, [and] the Fund knew of the ambiguity and was aware of the parties' interpretation of their mutual intent, as reflected, *inter alia*, in the Step 3 Grievance Committee decision"); *id.* at 9a n.24 ("Significantly, the same facts that support estoppel establish the non-existence of any purported 'secret side agreement' between Kroger and the Union. Furthermore, the information Kroger provided to the Fund (including the ambiguous CBAs) precludes the Fund from prevailing * * *.").

would set aside its extrinsic evidence rule if the proffering party could prove that the fund had been aware of the extrinsic evidence. *Id.* at 11 (speculating that proof of the fund's awareness "might make a difference" to the Seventh Circuit).[3] In this case, respondents submit, there was no express finding that the fund was actually aware of the longstanding interpretation of "casual" employee by petitioner and the union. Thus, respondents maintain that this is simply a case where the union and the employer had a secret oral side agreement, and that the exclusion of extrinsic evidence was proper and consistent with the approaches of other circuits, including the Third Circuit. These contentions are belied by the decisions below and by the record evidence.

First, the Seventh Circuit's two opinions in this case refute respondents' suggestion that the court's extrinsic evidence rule applies only to evidence that was concealed from the fund. In its first opinion, the court held unequivocally that "it is the plain text of the CBA upon which the Fund is entitled to rely," Pet. App. 49a. The court was equally clear in the second opinion, saying that Section 515 "allows pension funds to 'enforce the writings according to their terms.'" *Id.* at 11a (quoting *Gerber Truck.*, 870 F.2d at 1149). The court of appeals disregarded petitioner's extrinsic evidence that the fund knew of and acquiesced in petitioner's construction of the CBA for 14 years, holding that petitioner was bound by the court's interpretation of the term "casual" employee because that term was not obviously ambiguous. *Id.* at 13a, 17a-19a. Respondents are not free to displace that holding with their musing that irrefutable proof of the fund's acquiescence "might make a difference" to the Seventh Circuit. Br. in Opp. 11.

Second, respondents make too much of the absence of a specific finding in the district court's opinions that the fund received "actual disclosure" of the 14-year practice of classifying new hires as casuals pending their receipt of a regular posi-

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[3] Respondents argued exactly the opposite position in the district court, where they asserted that the Seventh Circuit's decisions in *Gerber Truck* and *Joe McClelland* foreclosed as a matter of law any defense based on the course of performance by the union and the employer. See, *e.g.*, Tr. 5-6.

tion on the regular seniority list. Br. in Opp. 12.[4] By "actual disclosure," respondents apparently mean a written notice under seal describing the interpretation of the CBA shared by the union, the employer, and the employees.[5] But petitioner provided the fund with copies of the CBAs and, beginning in or about 1975, sent the fund a monthly report identifying each employee's date of hire and the much later date on which petitioner began making pension contributions for the employee. Pet. App. 17a; see also C.A. Supp. App. 190-206.[6]

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[4] The absence of any findings below concerning petitioner's disclosures to the fund and respondents' knowledge of petitioner's and the union's course of conduct is an unfortunate consequence of the erroneous rule of the courts below – which petitioner asks this Court to review – that such disclosure and knowledge are ***irrelevant***. See Pet. App. 13a, 16a, 17a-18a. Nowhere is this clearer than in the estoppel section of the Seventh Circuit's second opinion. The court summarized but did not otherwise discuss petitioner's contention that the fund misrepresented to petitioner its acquiescence in the treatment of new employees as casuals, because the court relied on the CBA's language alone to conclude that petitioner "was in a better position than the fund to know the truth that its practice did not comport with the CBA." *Id.* at 18a.

[5] Alternatively, respondents seem to make the astounding assertion that, as long as they did not bother to ***read*** the notices petitioner sent them, they were entitled to the exact same treatment as a fund that did not ***receive*** any such notices. Br. in Opp. 13-14.

[6] Respondents admit that the fund received these reports, but assert that the reports did not begin until October 1987. Br. in Opp. 13. That is false. Petitioner's witness Stevens testified that she began sending the reports to Central States in 1974 or 1975. Tr. 566. The transcript pages that respondents cite in supposed contradiction of Stevens's testimony merely contain witness Evans's statement that she could not find any reports dated earlier than September 1987 in Cental States' files, but contain no discussion of Central States' record retention practices. Tr. 696-697. Respondents also try to mislead the Court by stating that only for a "minuscule portion" of the listed employees do the reports show a significant gap between the date of hire and the date on which contributions began. Br. in Opp. 13. The "minuscule portion" that respondents refer to comprises the total pool of casual employees for whom respondents have obtained retroactive contributions through this lawsuit.

The Kroger employee responsible for preparing these reports testified without contradiction that she made a notation on the reports when an employee was added to the regular seniority list (at which point contributions would commence for the employee). C.A. Supp. App. 195-196. Despite these regular communications reflecting the classification of new hires as casuals who were ineligible for pension contributions, and its continuous possession of the CBAs that the fund claims required contributions after 30 days of employment, the fund remained "silen[t] * * * over [a] long period of time," as the district court found. Pet. App. 24a.

Respondents' protestations that the fund did not have "actual disclosure" of the parties' interpretation of the CBA, Br. in Opp. 10, and that they were "[a]t most * * * negligent" in failing to object to that interpretation, *id.* at 12 (quoting Pet. App. 25a), do not advance their efforts to explain away the conflict between this case and *Rolls Royce*. In concluding that "the Funds' conduct also reflects their understanding that the [CBA] did not require payments for probationary employees," 989 F.2d at 137, the Third Circuit cited no special form of notice that put the funds on notice of the contracting parties' position. Rather, it was the five-year course of conduct ***itself***, together with the funds' failure to object, that the Third Circuit in *Rolls Royce* found dispositive. *Rolls Royce* was a stronger case for the disregard of extrinsic evidence because there was no indication there that the funds were receiving reports or other information from which they could discern the parties' interpretation of the CBA. Nevertheless, the Third Circuit held that funds have a fiduciary duty to "take steps to identify all participants and beneficiaries," and to "notify [ ] pensioner[s] of [their] employer's failure to contribute to the fund as required by the pension agreement." 989 F.2d at 137 (internal quotation marks omitted). Because the funds remained silent for five years about the employer's failure to make contributions for its probationary employees, the Third Circuit held that extrinsic evidence could establish the meaning of the term "each employee." *Id.* at 134-135. In the present case, the fund remained silent for 14 years, during which it received reports confirming that petitioner was not making the contributions to which the fund now claims entitlement.

The CBA in this case required pension contributions only for regular employees on the regular seniority list, but not for casual employees, a category describing employees who are "hired on a short-term basis" and "employed from time to time." Pet. App. 3a. Petitioner's extrinsic evidence – including not only the union's and fund's 14-year acquiescence in a course of performance but also the Step 3 Grievance Committee decision upholding petitioner's interpretation – was intended merely to establish what the company and the union agreed upon in the pension provision of the CBA.[7] They agreed that new hires would be classified as casuals until they secured a regular position on the regular seniority list, and that pension contributions would not be made until that transition occurred. See *id.* at 25a, 62a. For 14 years, petitioner made the contributions it understood were due under the CBA without objection from the union or the fund. Unlike the funds in *Rolls Royce*, respondents re-

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[7] Contrary to respondents' assertion (Br. in Opp. 20-21), course-of-performance evidence is exactly the sort of evidence that the common law of contracts allows to be used to show that a seemingly unambiguous contract term is in fact ambiguous. See RESTATEMENT (SECOND) OF CONTRACTS § 223 cmt. b (1981) ("There is no requirement that an agreement be ambiguous before a course of dealing can be shown * * *."), *quoted in Rolls Royce*, 989 F.2d at 135; see also Pet. 22-24 & n.7 (collecting additional authorities). If the Seventh Circuit's decision in *AM Int'l, Inc.* v. *Graphic Management Assocs., Inc.*, 44 F.3d 572 (1995), really stood for the proposition that "only evidence *provided by* disinterested third parties can be used to establish extrinsic ambiguity," as respondents claim (Br. in Opp. 20 (emphasis added)), then that would merely be another instance of irreconcilable conflict between the Seventh Circuit and *Rolls Royce*, but in fact the case says nothing of the kind. What Judge Posner said for the court in that case is that the evidence offered to show ambiguity in an apparently clear contract must be *the kind* of evidence that *can be* supplied by disinterested third parties because it is objectively verifiable – as both the course of performance and the Step 3 Grievance Committee decision in this case are – as opposed to the subjective testimony of the parties themselves as to what they believe the contract means. *Id.* at 575. This is not a case in which all the employer and the union have to offer is a "claim that they *really meant* the employees on the Peerless in Lake Michigan." Br. in Opp. 20 (emphasis added); cf. Pet. 20 (both discussing *Raffles* v. *Wichelhaus*, 2 H. & C. 906, 159 Eng. Rep. 375 (Ex. 1864)). It is not the common law of contracts, but the Seventh Circuit's ***departure from*** that body of law in the name of Section 515, that explains the result below.

ceived monthly statements from petitioner showing a significant gap between the date of hire and the date on which contributions commenced. Whereas the funds in *Rolls Royce* remained silent over a five-year period, respondents' inaction spanned 14 years. There is simply no support for respondents' supposition that the Third Circuit, like the Seventh Circuit, would have rewarded their inattention with a million-dollar judgment.

c. As a final stratagem, respondents attempt to repackage this case as one raising some other issue of Section 515 law that would be resolved the same way under the precedents of the Third and Seventh Circuits. For example, they argue that the Third Circuit, like the court below, will allow a fund to enforce the written CBA even if it has some knowledge of inconsistent terms discussed by the parties during the negotiations leading up to the CBA. Br. in Opp. 15 (citing *Central Pa. Teamsters Pension Fund* v. *McCormick Dray Line, Inc.*, 85 F.3d 1098, 1103 (3d Cir. 1996)). But this case is not about what transpired during the collective bargaining negotiations between petitioner and the union. The question in this case is whether petitioner and the union agreed in the CBA that the disputed contributions would be made. Resolution of that question is dispositive because, as we explained (Pet. 19), Section 515 only requires employers to make those contributions promised in the CBA, and it does not allow funds to "enforce [] nonexistent contractual obligation[s]." *Rolls Royce*, 989 F.2d at 138.

Respondents also repeatedly attempt to frame this case as one involving an oral side agreement modifying the written CBA. Br. in Opp. 10-14, 18-19. That characterization is understandably more comfortable for respondents because every circuit that has considered the question has held that employers may not make pension promises in a CBA and then terminate the promised contributions through a subsequent side agreement with the union. But, again, this case is not about ***modifications*** of the pension provisions of a CBA. The question presented in this case is whether extrinsic evidence may be introduced in a Section 515 action to establish that pension provisions in the original CBA, as written, are ambiguous, and that the disputed

contributions are not required under the CBA as interpreted by the employer, the union, and the fund for more than 14 years.[8]

2. As we explained (Pet. 26-30), whether extrinsic evidence may be used to show ambiguity in CBAs subject to ERISA is an important issue that has arisen frequently since Section 515 was enacted more than 20 years ago. Unless this Court grants review, the lower court's rule will continue to expose employers to the risk of a surprise Section 515 award at the end of a collective bargaining term. This risk will "inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements," *Local 174, Teamsters, Chauffeurs, Warehousemen & Helpers of Am.* v. *Lucas Flour Co.*, 369 U.S. 95, 103 (1962), as employers attempt to minimize their exposure by reducing their pension promises. Further review will avert those consequences by ensuring that employers are not saddled with pension obligations beyond those agreed to by the employer and the union in the CBA.

For the foregoing reasons and the reasons stated in the petition, the petition for a writ of certiorari should be granted.

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[8] The funds in *Rolls Royce* made the same argument as respondents here, and the answer should be the same (989 F.2d at 138 (citation omitted)):

> The Funds argue that as third party beneficiaries of the [CBA], they may enforce the agreement as written notwithstanding any oral modifications made by Rolls-Royce and the Union. While this is true, it is irrelevant. Rolls-Royce does not argue that the [CBA] created an obligation which an oral understanding or course of conduct extinguished. Rolls-Royce asserts that the written agreement never required it to make contributions for probationary employees. Rolls-Royce proffered evidence of the practice of the parties over the years to shed light on the contract parties' intention when they signed the ambiguous [CBA]. It did not proffer the evidence to demonstrate a subsequent modification of an existing responsibility.

Respectfully submitted,

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No. 00-1304

In The
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October Term, 2000

THE KROGER COMPANY,

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CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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MOTION FOR LEAVE TO FILE BRIEF, *AMICUS CURIAE*, AND BRIEF OF *AMICUS CURIAE*, AMERICAN BAKERS ASSOCIATION, IN SUPPORT OF THE PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF, *AMICUS CURIAE*

Pursuant to Rule 37.2(b) of this Court, the American Bakers Association ("ABA"), by its undersigned counsel, hereby moves for leave to file its brief as *amicus curiae* in support of the Petitioner, The Kroger Company.* In support of its Motion, the ABA states:

The ABA is the trade association that represents the nation's wholesale baking industry. Its membership consists of more than 300 wholesale bakery and allied member firms. These firms comprise companies of all sizes, ranging from family-owned enterprises to companies affiliated with Fortune 500 corporations. Together, these companies

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* Prior to filing this Motion, the ABA sought the consent of both parties to the filing of its brief, as required by Rule 37.2 of this Court. The Petitioner consented to this request, however, the Respondents did not respond, necessitating this Motion.

produce approximately 80 percent of the nation's baked goods. The members of the ABA collectively employ tens of thousands of employees nationwide in their production, sales, and distribution operations. The ABA, therefore, serves as the principal voice of the American wholesale bakery industry.

The ABA believes that its participation as *amicus curiae* will benefit the Court in this proceeding. The wholesale baking industry features a relatively high percentage of union representation in its workforce. While definitive statistics are not available, the ABA estimates that approximately 60-70 percent of the workers employed by its member companies are represented by labor organizations (most commonly, the Bakery, Confectionery, Tobacco Workers and Grain Millers Union, and the International Brotherhood of Teamsters). ABA members have experience in negotiating and implementing collective bargaining agreements. In certain instances, for any number of reasons, these contracts may *not* include a detailed definition of each term used, or they may utilize potentially inconsistent terms. In such circumstances, baking industry firms and the respective labor unions typically define ambiguous terms and resolve potential inconsistencies by establishing a mutually agreeable practice. Moreover, these baking companies and the labor organizations then typically follow these mutually agreeable practices for years without incident.

Thus, ABA members have first-hand familiarity with the manner in which employers and unions representing bakery industry employees fill in "gaps" in collective bargaining agreements and amicably resolve possible conflicts within collective bargaining agreements. They also have a national view of the manner in which challenges by a multi-employer fund to practices implemented by the parties to collective bargaining agreements – including those previously accepted by the fund – can and will have a

dramatic and adverse effect on the stability of labor-management relations in a broad range of industries.

WHEREFORE, the ABA respectfully requests that the Court grant its motion and permit its filing of the accompanying brief, *amicus curiae*, in support of the Petitioner.

Respectfully submitted,

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No. 00-1304

In The
Supreme Court of the United States
October Term, 2000

THE KROGER COMPANY

Petitioner,

v.

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF OF *AMICUS CURIAE*, AMERICAN BAKERS ASSOCIATION, IN SUPPORT OF THE PETITIONER

INTEREST OF THE AMICUS[1]

The American Bakers Association ("ABA") is the trade association that represents the nation's wholesale baking industry. Its membership consists of more than 300 wholesale bakery and allied member firms. These firms comprise companies of all sizes, ranging from family-owned enterprises to companies affiliated with Fortune 500 corporations. Together, these companies produce

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[1] The ABA hereby certifies, in accordance with Rule 37.6 of this Court, that no counsel for a party authored this brief in whole or in part. In addition, no person or entity, other than the ABA, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief.

approximately 80 percent of the nation's baked goods. The members of the ABA collectively employ tens of thousands of employees nationwide in their production, sales, and distribution operations. The ABA, therefore, serves as the principal voice of the American wholesale bakery industry.

The ABA's members have extensive experience in negotiating and implementing collective bargaining agreements. A sizable percentage of baking industry employees are represented by labor unions, and many ABA-member companies have multiple collective bargaining agreements that cover different segments of their workforces. In some instances, for a variety of reasons, individual contracts may not include a detailed definition of each term used or they may utilize potentially inconsistent terms. In such circumstances, industry employers and the respective labor organizations define ambiguous terms and resolve potential inconsistencies by establishing mutually acceptable practices. Thus, the ABA and its members have first-hand familiarity with the manner in which employers and unions fill in "gaps" in collective bargaining agreements and amicably resolve possible conflicts in the day-to-day implementation of collective bargaining agreements. They also have a broad perspective on the impact of a multi-employer fund's effective "challenge" to the peaceful resolution of differences between parties to union contracts, such as is presented in this case.

The core question in this case is whether extrinsic evidence of the parties' course of performance under a collective bargaining agreement may be introduced to establish the meaning of the terms in the collective bargaining agreement. This case involves a multi-employer fund's challenge under Section 515 of ERISA to the employer's past practice of contributing to the fund on the ground that the employer's practice allegedly conflicts with the collective bargaining agreement. Of particular

importance in this case is the fact that the fund knew of and acquiesced to the employer's and union's interpretation of the contribution obligations for a period of 14 years. This issue is of great concern and direct relevance to all companies that are parties to collective bargaining agreements that require contributions to multi-employer pension funds. A great many members of the ABA are parties to such agreements, and – as is the case throughout the economy – there often are ambiguities in such contracts that regularly are resolved by the parties through mutual adjustment and resolution, and the adoption of a "practice" (as was done by Kroger and the union in this case) that the parties believe comports with their intent when they negotiated the applicable contract language read as a whole.

As such, the outcome of this case will have serious and far-reaching effects on employers throughout the country. If the decision of the U.S. Court of Appeals for the Seventh Circuit is not reversed, employers will face liability for pension fund contributions that they never agreed to make, that unions never requested, and that employees never expected. In addition, employers will face liability for the attorneys' fees and costs related to the Section 515 action to collect "delinquent" contributions. This situation will undoubtedly impact a large number of collective bargaining relationships, as employers likely will bargain for lower pension contributions to offset the potential risks and costs associated with collection actions like the one at issue in this case.

The decision of the U.S. Court of Appeals for the Seventh Circuit calls into question basic principles of contract interpretation and ignores critical aspects of the factual setting of this case. The parties to the collective bargaining agreement followed – for a period of 14 years – the contract interpretation that is the subject of the challenge initiated by the Central States, Southeast and Southwest Areas Pension Fund ("Fund") in the instant case. The Fund

had knowledge of the alleged conflict between the interpretation and the contract language during that period. The appellate court ignored the parties' course of performance when it decided that contributions were in fact owed for the casual employees at Kroger's Atlanta facility.

A definitive ruling from this Court on the issue of when extrinsic evidence of parties' course of performance under a collective bargaining agreement should be admissible to determine the meaning of its terms would be highly beneficial. It would provide critical and necessary guidance nationally to parties engaged in collective bargaining agreements in a host of settings. Consequently, the ABA and its member-companies have a keen interest in this Court's favorable action on the Petition for a Writ of Certiorari, to resolve questions that otherwise will face many parties in addition to the litigants directly interested in this proceeding.

INTRODUCTION & SUMMARY OF FACTS

For at least the past 30 years, Kroger and the International Brotherhood of Teamsters ("Teamsters") have negotiated and entered into collective bargaining agreements which cover Kroger's distribution center warehouse employees. Kroger and the Teamsters negotiate these agreements in two parts: a Master Agreement that contains terms and conditions applicable to all sites, and a Local Supplement that contains additional terms and conditions that apply only to a single site.

The Master Agreement defines three classifications of employees: (1) "regular" employees who have bid for a position and are on the regular seniority list; (2) "probationary" employees who have been hired on a trial basis, and who will be added to the regular seniority list after 30 working days or 60 calendar days of employment; and (3) "casual" employees who are hired on a short-term basis and

employed from time to time, and are not included on the regular seniority list. The Master Agreement requires Kroger to make pension contributions to the Fund for "regular" employees on the regular seniority list.

In 1977, Kroger and the Teamsters agreed that all new warehouse hires at the Atlanta distribution center would be classified as "casual" employees, not "probationary" employees, and informed the Fund of the agreement. New hires were notified that they would initially be classified as "casual" employees and consequently would not accrue seniority or be eligible for pension contributions until they were re-classified as "regular" employees. In addition, the applicable Local Supplement provided that "part-time" employees would become eligible for pension contributions after bidding on a regular, full-time position, completing 30 days of full-time employment, and being placed on the regular seniority list. Kroger made pension contributions to the Fund for all "regular" employees on the regular seniority list. Indeed, the Fund received monthly reports showing that contributions were not being made for the new hires until they became "regular" employees.

In 1991, the Teamsters and the Fund decided to challenge Kroger's practice of not making contributions for "casual" employees. The dispute between the Teamsters and Kroger was resolved at Step 3 of the grievance procedure established by the collective bargaining agreement. The Step 3 Committee denied the grievance, determining that employees who were not "regular employees" on the regular seniority list were not entitled to pension contributions based on the parties' course of performance under the collective bargaining agreement.

The Fund filed suit under Section 515 of ERISA, claiming that the new hires in Atlanta were "probationary" employees for whom Kroger should make contributions after

the 30th day of employment. The Fund prevailed in the lower court despite the fact that Kroger and the Teamsters had agreed for years that pension contributions would not be made for the employees at issue, the employees knew that they were not eligible for pension contributions, and the Fund had not objected to Kroger's practice for 14 years. *Central States, Southeast and Southwest Areas Pension Fund v. Kroger Co.*, 226 F.3d 903 (7th Cir. 2000). In addition, the court ignored the fact that the dispute was resolved in favor of Kroger in the grievance proceeding.

The ABA respectfully submits that the U.S. Court of Appeals for the Seventh Circuit erred by failing to consider the extrinsic evidence of the parties' course of performance under the collective bargaining agreement when determining the meaning of the terms of the agreement. The impact of this ruling extends well beyond the grocery industry and warehouse employees involved in the instant dispute to virtually all industries and employees covered by collective bargaining agreements that require multi-employer pension contributions.

This Court's decision on the Petition will have serious consequences because the ability of employers, unions, multi-employer funds, and employees to rely on agreed upon pension contribution practices will be drastically undermined if the Petition is denied. Accordingly, the ABA urges this Court to grant the Petition for a Writ of Certiorari, and reverse the decision below.

ARGUMENT

I. CONSIDERATION OF THE PAST PRACTICES OF THE PARTIES TO A COLLECTIVE BARGAINING AGREEMENT IS CRUCIAL WHEN DETERMINING THE MEANING OF TERMS IN THE AGREEMENT.

Collective bargaining agreements are a unique type of contract because they usually are not drafted by lawyers and consequently tend to be less comprehensive in comparison to many other types of contracts. The "gaps" found in collective bargaining agreements, including gaps caused by ambiguity, often are filled in by a course of performance agreed to by the employer and the union. This procedure for filling in "gaps" has been utilized for years and is accepted by this Court, appellate courts, and arbitrators as a vital and integral component of collective bargaining agreement interpretation.

This Court has recognized that the manner in which the parties perform under a contract is a reliable indicator of the parties' intent when they entered into the contract. *See Old Colony Trust Co. v. City of Omaha*, 230 U.S. 100, 118 (1913) ("Generally speaking, the practical interpretation of a contract by the parties to it for any considerable period of time before it comes to be the subject of controversy is deemed of great, if not controlling, influence."). This Court also has recognized specifically the importance of past practice in interpreting collective bargaining agreements. *See Steelworkers v. Warrior & Gulf Navigation Co.*, 80 S. Ct. 1347, 1351-52 (1960) ("The labor arbitrator's source of law is not confined to the express provisions of the contract, as the industrial common law – the practices of the industry and the shop – is equally a part of the collective bargaining agreement although not expressed in it.").

Numerous appellate courts – including the U.S. Court of Appeals for the Seventh Circuit – have approved of arbitrators' consideration of past practice in interpreting collective bargaining agreements. *See, e.g., Smith Steel Workers DALU 19806 v. A.O. Smith Corp.*, 626 F.2d 596 (7th Cir. 1980); *Boise Cascade Corp. v. Steelworkers Local 7001*, 588 F.2d 127 (5th Cir. 1979); *Auto Workers Locals 932, 1147, 107, 337 v. White Motor Corp.*, 505 F.2d 1193 (8th Cir. 1974).

Arbitrators look to the parties' past practices to give meaning to ambiguous collective bargaining agreement language as a matter of course. *See* Frank Elkouri, *How Arbitration Works* 648 (1997) ("One of the most important standards used by arbitrators in the interpretation of ambiguous contract language is the custom or past practice of the parties."). In determining the weight to be accorded past practice, arbitrators consider a variety of factors including how well established the practice is, i.e. how many years the practice in question has been followed.

The U.S. Court of Appeals for the Seventh Circuit correctly stated that Section 515 prohibits an employer from relying on side agreements that have not been disclosed to the fund. 226 F.3d at 911. However, in this case, the practice of not making pension contributions for casual employees was not a side agreement nor was it unknown to the Fund. The extrinsic evidence of the parties' course of performance should have been considered for purposes of determining the meaning of the terms of the collective bargaining agreement in this case, especially since the contracting parties had finally resolved through the contractual grievance procedure any disputes related to their past practices or course of performance.

There is no good reason why extrinsic evidence of the parties' course of performance under a collective

bargaining agreement should be excluded from a Section 515 case, especially when the practice was known to the fund. In fact, some appellate courts have recognized that an employer should be allowed in a Section 515 case to show that a collective bargaining agreement term has an uncommon meaning using any extrinsic evidence known to the fund when the allegedly delinquent contributions accrued. *See, e.g., Teamsters Indus. Employees Welfare Fund v. Rolls-Royce Motor Cars, Inc.*, 989 F.2d 132 (3d Cir. 1993) (allowing employer to introduce extrinsic evidence of past practice to establish meaning of "each employee" in collective bargaining agreement); *Brown-Graves Co. v. Central States, S.E. & S.W. Areas Pension Fund*, 206 F.3d 680 (6th Cir. 2000).

Though cognizant of the special status accorded to pension funds as third-party beneficiaries of collective bargaining agreements, the ABA believes that extrinsic evidence should be considered when interpreting contribution clauses. The parties' course of performance under the collective bargaining agreement always has played a vital role in agreement interpretation because it is demonstrative of the parties' intent when they entered into the agreement. Such extrinsic evidence should be taken into account in all cases – including Section 515 cases – because it is the most reliable indicator of the intended meaning of ambiguous terms in a collective bargaining agreement.

II. EXCLUDING EXTRINSIC EVIDENCE OF PAST PRACTICES UNDER COLLECTIVE BARGAINING AGREEMENTS IN SECTION 515 CASES WILL HAVE NEGATIVE CONSEQUENCES FOR EMPLOYEES AND EMPLOYERS.

A. Employers Will Be Less Likely To Agree To Collective Bargaining Agreement Clauses Requiring Pension Contributions For Employees.

The appellate court decision in this case likely will cause employers to be reluctant to agree to collective bargaining agreement clauses requiring multi-employer pension contributions because of the increased chance that they will be held responsible for contributions that they did not agree to make.

Many employers throughout the country make pension contributions to multi-employer funds so that their employees will have financial support during retirement. According to the Pension Benefit Guaranty Corporation, there were approximately 9 million covered participants in multi-employer funds in 1999. *See* Pension Benefit Guaranty Corporation, *Pension Insurance Data Book 1999* 58 (2000). If employers believe that they will face liability for pension contributions for employees other than ones for whom contributions were agreed to in a collective bargaining agreement, it is predictable that such employers will be less likely to participate in such funds for the benefit of their employees.

The appellate court's exclusion of extrinsic evidence of the parties' practice under the collective bargaining agreement in this case would cause the employer to be held liable for pension contributions in excess of those to which it had agreed. This outcome will discourage employers from

agreeing to make multi-employer pension contributions for employees, and consequently will lead to increased financial instability for retired employees.

By contrast, permitting extrinsic evidence of past practice under a collective bargaining agreement to be considered when interpreting contractual pension contribution language in Section 515 cases will reinforce employers' willingness to make contributions to multi-employer funds, and may enhance employers' willingness to agree to other forms of retirement security for employees.[2]

B. Alternate Staffing Strategies Are Utilized Widely Throughout the Economy, and the Parties' Adaptation to Such Trends and Options Should Be Recognized and Honored by Multi-Employer Plans.

In the collective bargaining relationship that is at the core of this dispute, Kroger and the Teamsters arrived at certain agreed-upon practices to implement their contract as applied to differing categories of workers. In this regard, their actions implemented the full understanding of the contract's terms, and are worthy of complete consideration and weight. The practice at issue here, treatment of "casual" workers, is one commonly faced today by parties to collective bargaining relationships and in non-union operations.

The American workforce today features large numbers of workers who are engaged on a part-time basis, those who chose to work as "temporaries" for extended periods, people who work at home and/or those who

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[2] According to the Bureau of Labor Statistics, approximately fifty percent of employees were eligible to participate in employer-provided pension plans in 1999. *See* Bureau of Labor Statistics, *Contingent and Alternative Employment Arrangements* (1999).

"telecommute," individuals who work for leasing companies and are assigned to various customers, independent contractors and multiple other variations that differ from more traditionally-structured employment relationships. According to the Bureau of Labor Statistics, there were approximately 8.2 million independent contractors, 1.2 million temporary workers, and 2 million on-call workers in 1999. *See* Bureau of Labor Statistics, *Contingent and Alternative Employment Arrangements* (1999). These and similar arrangements are utilized for multiple reasons that vary with the setting, and are sought by large numbers of employers and employees across the country.

In structuring their workforces and the conduct of their operations, unionized employers may find such arrangements to be desirable in certain circumstances, as do their non-union counterparts. For a variety of reasons, labor unions that represent the "traditional" workforce at such companies also may find it desirable to allow such flexibility at worksites in which they have an interest. In a great many of these cases, the collective bargaining agreements between the parties will not explicitly address all aspects of such staffing arrangements, but their use is resolved by the parties to the contract, either through mutual agreement and the establishment of accepted practice, or following the challenge of such alternatives under contractual grievance mechanisms.

Where the parties have developed such established "practices" that are known to interested multi-employer funds, those funds should not have the ability to disrupt such settled practices through a Section 515 action. Under the formulation of the U.S. Court of Appeals for the Seventh Circuit, not only may employers be less likely to employ workers in non-traditional arrangements (even though they and the union effectively may recognize and agree on the benefit or necessity of such action), but also their businesses

– and the continued employment and pension security of unit workers – may be jeopardized by the financial uncertainty that may result.

The logical – and nearly universally accepted – way to resolve disputes regarding ambiguous terms in a collective bargaining agreement is to consider the parties' course of performance under the agreement. Except when Congress has specifically mandated different treatment, there is no reason why a dispute regarding whether a collective bargaining agreement clause requires pension fund contributions for all employees or only particular categories of employees should be treated differently.

C. The Appellate Court's Ruling Likely Will Lead to the Assertion of a Flood of Stale Claims.

If the appellate court's decision is not reversed, there likely will be a rash of claims by funds against employers for allegedly delinquent contributions that accrued years ago. This would be unfair to employers who have spent countless hours negotiating collective bargaining agreements and then worked with unions to establish reasonable and fair practices to fill in the inevitable gaps in those agreements. To require employers to defend against such claims will waste management time and resources that could be better used addressing important workplace issues. Moreover, to require employers to defend against such claims and to prevent them from using their best evidence to justify their actions is simply unfair.

CONCLUSION

For the above-stated reasons, the ABA respectfully urges this Court to grant review of this matter. This action is necessary to determine whether the U.S. Court of Appeals for the Seventh Circuit erred in concluding that Kroger

should have made pension contributions for the employees at issue. The ruling below raises serious questions about the propriety and financial ramifications of practices adopted – through the agreement or acquiescence of the interested parties – throughout the economy.

This Court's granting of the Petition and its full consideration of the decision of the appellate court is necessary to resolve compelling questions that threaten to have an immediate and dramatic impact on long-standing interpretations of collective bargaining agreements across the nation.

Respectfully submitted,

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